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VOL. LXXIV.

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VOL. LXXIV.

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

	PAGE.
ALABAMA REPORTS Vol. 120.	17-67
ARKANSAS REPORTS Vol. 66.	68-123
FLORIDA REPORTS Vol. 40.	124-156
ILLINOIS REPORTS Vol. 182.	157-273
INDIANA REPORTS Vol. 153.	274-328
MAINE REPORTS Vol. 93.	329-376
MICHIGAN REPORTS Vol. 118.	377-437
MINNESOTA REPORTS Vol. 75.	438-516
MISSOURI REPORTS Vol. 151.	517-581
MONTANA REPORTS Vol. 22.	582-629
NORTH CAROLINA REPORTS Vol. 125.	630-671
PENNSYLVANIA STATE REPORTS . . Vol. 193.	672-706
SOUTH CAROLINA REPORTS Vol. 55.	707-773
SOUTH DAKOTA REPORTS Vol. 11.	774-833
WISCONSIN REPORTS Vol. 103.	834-922

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SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES
REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL
REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures.

ALABAMA. — (83) **3**; (84) **5**; (85) **7**; (86) **11**; (87) **13**; (88) **16**; (89) **18**; (90, 91) **24**; (92) **25**; (93) **30**; (94) **33**; (95) **36**; (96, 97) **38**; (98) **39**; (99) **42**; (100, 101) **46**; (102) **48**; (103) **49**; (104, 105) **53**; (106, 107, 108) **54**; (109, 110) **55**; (111) **56**; (112) **57**; (113) **59**; (114) **62**; (115, 116) **76**; (118, 119) **72**; (120) **74**.

ARKANSAS. — (48) **3**; (49) **4**; (50) **7**; (51) **14**; (52) **20**; (53) **22**; (54) **26**; (55) **29**; (56) **35**; (57) **38**; (58) **41**; (59) **43**; (60) **46**; (61, 62) **54**; (63) **58**; (64) **62**; (65) **67**; (66) **74**.

CALIFORNIA. — (72) **1**; (73) **2**; (74) **5**; (75) **7**; (76) **9**; (77) **11**; (78, 79) **12**; (80) **13**; (81) **15**; (82) **16**; (83) **17**; (84) **18**; (85) **20**; (86) **21**; (87, 88) **22**; (89) **23**; (90, 91) **25**; (92, 93) **27**; (94) **28**; (95) **29**; (96) **31**; (97) **33**; (98) **35**; (99) **37**; (100) **38**; (101) **40**; (102) **41**; (103) **42**; (104) **43**; (105) **45**; (106) **46**; (107) **48**; (108) **49**; (109) **50**; (110, 111) **52**; (112) **53**; (113) **54**; (114) **55**; (115) **56**; (116) **58**; (117) **59**; (118) **62**; (119) **63**; (120) **65**; (121) **66**; (122) **68**; (123) **69**; (124) **71**; (125) **73**.

COLORADO. — (10) **3**; (11) **7**; (12) **13**; (13) **16**; (14) **20**; (15) **22**; (16) **25**; (17) **31**; (18) **36**; (19) **41**; (20) **46**; (21) **52**; (22) **55**; (23) **58**; (24) **65**; (25) **71**.

CONNECTICUT. — (54) **1**; (55) **3**; (56) **7**; (57) **14**; (58) **18**; (59) **21**; (60) **25**; (61) **29**; (62) **36**; (63) **38**; (64) **42**; (65) **48**; (66) **50**; (67) **52**; (68) **57**; (69) **61**; (70) **66**; (71) **71**.

DELAWARE. — (5 *Houst.*) **1**; (6 *Houst.*) **22**; (7 *Houst.*) **40**; (9 *Houst.*) **43**; (1 *Marv.*) **65**; (2 *Marv.*) **69**; (1 *Pennewill*) **73**.

FLORIDA. — (22) **1**; (23) **11**; (24) **12**; (25, 26) **23**; (27) **26**; (28) **29**; (29) **30**; (30) **32**; (31) **34**; (32) **37**; (33) **39**; (34) **43**; (35) **48**; (36) **51**; (37) **53**; (38) **56**; (39) **63**; (40) **74**.

GEORGIA. — (76) **2**; (77) **4**; (78) **6**; (79) **11**; (80, 81) **12**; (82) **14**; (83, 84) **20**; (85) **21**; (86) **22**; (87) **27**; (88) **30**; (89) **32**; (90) **35**; (91, 92, 93) **44**; (94) **47**; (95, 96) **51**; (97) **54**; (98) **58**; (99) **59**; (100) **62**; (101) **65**; (102) **66**; (103) **68**; (104) **69**; (105) **70**; (106) **71**; (107) **73**.

IDAHO. — (2) **35**.

ILLINOIS. — (121) **2**; (122) **3**; (123) **5**; (124) **7**; (125) **8**; (126) **9**; (127) **11**; (128) **15**; (129) **16**; (130) **17**; (131) **19**; (132) **22**; (133, 134) **23**; (135) **25**; (136) **29**; (137) **31**; (138, 139) **32**; (140, 141) **33**; (142) **34**; (143, 144, 145) **36**; (146, 147) **37**; (148) **39**; (149, 150) **41**; (151) **42**; (152) **43**; (154) **45**; (153, 155) **46**; (156) **47**; (157) **48**; (158) **49**; (159) **50**; (160, 161) **52**; (162) **53**; (163) **54**; (164, 165) **56**; (166) **57**; (167) **59**; (168, 169) **61**; (170) **62**; (171) **63**; (172, 173) **64**; (174) **66**; (175) **67**; (176) **68**; (177, 178) **69**; (179) **70**; (180, 181) **72**; (182) **74**.

- INDIANA.** — (112) 2; (113) 3; (114) 5; (115) 7; (116) 9; (117, 118) 10; (119) 12; (120, 121) 16; (122) 17; (123) 18; (124) 19; (125) 21; (126, 127) 22; (128) 25; (129) 28; (130) 30; (131) 31; (132) 32; (133) 36; (134) 39; (135) 41; (136) 43; (137) 45; (138) 46; (139) 47; (140) 49; (1, 2, 3, Ind. App.; 141) 50; (4, 5, 6, Ind. App.; 142) 51; (7, 8, Ind. App.; 143) 52; (9, 10 Ind. App.) 53; (11 Ind. App.) 54; (13 Ind. App.; 144) 55; (14 Ind. App.) 56; (15 Ind. App.; 145) 57; (146) 58; (16 Ind. App.) 59; (17 Ind. App.) 60; (147, 148) 62; (18 Ind. App.; 149) 63; (150, 19 Ind. App.) 65; (20 Ind. App.) 67; (151) 68; (21 Ind. App.) 69; (152) 71; (22 Ind. App.) 72; (153) 74.
- IOWA.** — (72) 2; (73) 5; (74) 7; (75) 9; (76, 77) 14; (78) 16; (79) 18; (80) 20; (81) 25; (82) 31; (83) 32; (84) 35; (85) 39; (86) 41; (87) 43; (88) 45; (89, 90), 48; (91) 51; (92) 54; (93) 57; (94, 95) 58; (96, 97) 59; (98) 60; (99) 61; (100) 62; (101, 102) 63; (103) 64; (104) 65; (105) 67; (106) 68; (107) 70.
- KANSAS.** — (37) 1; (38) 5; (39) 7; (40) 10; (41) 13; (42) 16; (43) 19; (44) 21; (45) 23; (46) 26; (47) 27; (48) 30; (49) 33; (50) 34; (51) 37; (52) 39; (53) 42; (54) 45; (55) 49; (56) 54; (57) 57; (58) 62; (59) 68; (60) 72.
- KENTUCKY.** — (83, 84) 4; (85) 7; (86) 9; (87) 12; (88) 21; (89) 25; (90) 29; (91) 34; (92) 36; (93) 40; (94) 42; (95) 44; (96) 49; (97) 53; (98) 56; (99) 59; (100) 66; (101) 72.
- LOUISIANA.** — (39 La. Ann.) 4; (40 La. Ann.) 8; (41 La. Ann.) 17; (42 La. Ann.) 21; (43 La. Ann.) 26; (44 La. Ann.) 32; (45 La. Ann.) 40; (46, 47 La. Ann.) 49; (48 La. Ann.) 55; (49 La. Ann.) 62; (50 La. Ann.) 69; (51 La. Ann.) 72.
- MAINE.** — (79) 1; (80) 6; (81) 10; (82) 17; (83) 23; (84) 30; (85) 35; (86) 41; (87) 47; (88) 51; (89) 56; (90) 60; (91) 64; (92) 69; (93) 74.
- MARYLAND.** — (67) 1; (68) 6; (69) 9; (70) 14; (71) 17; (72) 20; (73) 25; (74) 28; (75) 32; (76) 35; (77) 39; (78) 44; (80) 45; (79) 47; (81) 48; (82) 51; (83) 55; (84) 57; (85) 60; (86) 63; (87) 67; (88) 71; (89) 73.
- MASSACHUSETTS.** — (145) 1; (146) 4; (147) 9; (148) 12; (149) 14; (150) 15; (151) 21; (152) 23; (153) 25; (154) 26; (155) 31; (156) 32; (157) 34; (158) 35; (159) 38; (160) 39; (161) 42; (162) 44; (163) 47; (164) 49; (165) 52; (166) 55; (167) 57; (168) 60; (169) 61; (170) 64; (171) 68; (172) 70; (173) 73.
- MICHIGAN.** — (60, 61) 1; (62) 4; (63) 6; (64, 65) 8; (66, 67) 11; (68, 69, 75) 13; (70) 14; (71, 76) 15; (72, 73, 74) 16; (77, 78) 18; (79) 19; (80) 20; (81, 82, 83) 21; (84) 22; (85, 86, 87) 24; (88) 26; (89) 28; (90, 91) 30; (92) 31; (93) 32; (94) 34; (95, 96) 35; (97) 37; (98) 39; (99) 41; (100) 43; (101) 45; (102) 47; (103) 50; (104) 53; (105) 55; (106) 58; (107) 61; (108) 62; (109) 63; (110) 64; (111) 66; (112, 113) 67; (114) 68; (115) 69; (116, 117) 72; (118) 74.
- MINNESOTA.** — (36) 1; (37) 5; (38) 8; (39, 40) 12; (41) 16; (42) 18; (43) 19; (44) 20; (45) 22; (46) 24; (47) 28; (48) 31; (49) 32; (50) 36; (51, 52) 38; (53) 39; (54) 40; (55) 43; (56) 45; (57) 47; (58) 49; (59) 50; (60) 51; (61) 52; (62) 54; (63) 56; (64) 58; (65) 60; (66) 61; (67, 68) 64; (69) 65; (70) 68; (71) 70; (72) 71; (73) 72; (74) 73; (75) 74.
- MISSISSIPPI.** — (65) 7; (66) 14; (67) 19; (68) 24; (69) 30; (70) 35; (71) 42; (72) 48; (73) 55; (74) 60; (75) 65; (76) 71.
- MISSOURI.** — (92) 1; (93) 3; (94) 4; (95) 6; (96) 9; (97) 10; (98) 14; (99) 17; (100) 18; (101) 20; (102) 22; (103) 23; (104, 105) 24; (106) 27; (107) 28;

(108, 109) **32**; (110, 111) **33**; (112) **34**; (113, 114) **35**; (115) **37**; (116, 117) **38**; (118) **40**; (119, 120) **41**; (121) **42**; (122) **43**; (123) **45**; (124, 125) **46**; (126) **47**; (127) **48**; (128) **49**; (129) **50**; (130) **51**; (131) **52**; (132) **53**; (133) **54**; (134) **56**; (135, 136) **58**; (137) **59**; (138) **60**; (139) **61**; (140) **62**; (141, 142) **64**; (143) **65**; (144) **66**; (145) **68**; (146) **69**; (147, 148) **71**; (149, 150) **73**; (151) **74**.

MONTANA. — (9) **18**; (10) **24**; (11) **28**; (12) **33**; (13) **40**; (14) **43**; (15) **48**; (16) **50**; (17) **52**; (18) **56**; (19) **61**; (20) **63**; (21) **69**; (22) **74**.

NEBRASKA. — (22) **3**; (23, 24) **8**; (25) **13**; (26) **18**; (27) **20**; (28, 29) **26**; (30) **27**; (31) **28**; (32, 33) **29**; (34) **33**; (35) **37**; (36) **38**; (37) **40**; (38) **41**; (39, 40) **42**; (41) **43**; (42, 43) **47**; (44) **48**; (45, 46) **50**; (47) **53**; (47, 48) **58**; (49) **59**; (50) **61**; (51, 52) **66**; (53) **68**; (54) **69**; (55) **70**; (56) **71**; (57) **73**.

NEVADA. — (19) **3**; (20) **19**; (21) **37**; (22) **58**; (23) **62**.

NEW HAMPSHIRE. — (64) **10**; (62) **13**; (65) **23**; (66) **49**; (67) **68**; (68) **73**.

NEW JERSEY. — (43 N. J. Eq.) **3**; (44 N. J. Eq.) **6**; (50 N. J. L.) **7**; (51 N. J. L.; 45 N. J. Eq.) **14**; (46 N. J. Eq.; 52 N. J. L.) **19**; (47 N. J. Eq.) **24**; (53 N. J. L.) **26**; (48 N. J. Eq.) **27**; (49 N. J. Eq.) **31**; (54 N. J. L.) **33**; (50 N. J. Eq.) **35**; (55 N. J. L.) **39**; (51 N. J. Eq.) **40**; (56 N. J. L.) **44**; (52 N. J. Eq.) **46**; (57 N. J. L.; 53 N. J. Eq.) **51**; (54 N. J. Eq.; 58 N. J. L.) **55**; (59 N. J. L.) **59**; (55 N. J. Eq.) **62**; (60 N. J. L.) **64**; (56 N. J. Eq.) **67**; (61 N. J. L.) **68**; (62 N. J. L.) **72**; (57 N. J. Eq.) **73**.

NEW YORK. — (107) **1**; (108) **2**; (109) **4**; (110) **6**; (111) **7**; (112) **8**; (113) **10**; (114) **11**; (115) **12**; (116, 117) **15**; (118, 119) **16**; (120) **17**; (121) **18**; (122) **19**; (123) **20**; (124, 125) **21**; (126) **22**; (127) **24**; (128, 129) **26**; (130, 131) **27**; (132, 133) **28**; (134) **30**; (135) **31**; (136) **32**; (137) **33**; (138) **34**; (139) **36**; (140) **37**; (141) **38**; (142) **40**; (143) **42**; (144) **43**; (145) **45**; (146) **48**; (147) **49**; (148) **51**; (149) **52**; (150) **55**; (151) **56**; (152) **57**; (153) **60**; (154) **61**; (155) **63**; (156) **66**; (157) **68**; (158, 159) **70**; (160) **73**.

NORTH CAROLINA. — (97, 98) **2**; (99, 100) **6**; (101) **9**; (102) **11**; (103) **14**; (104) **17**; (105) **18**; (106) **19**; (107) **22**; (108) **23**; (109) **26**; (110) **28**; (111) **32**; (112) **34**; (113) **37**; (114) **41**; (115) **44**; (116) **47**; (117) **53**; (118) **54**; (119) **56**; (120) **58**; (121) **61**; (122) **65**; (123) **68**; (124) **70**; (125) **74**.

NORTH DAKOTA. — (1) **26**; (2) **33**; (3) **44**; (4) **50**; (5) **57**; (6, 7) **66**; (8) **73**.

OHIO. — (45 Ohio St.) **4**; (46 Ohio St.) **15**; (47 Ohio St.) **21**; (48 Ohio St.) **29**; (49 Ohio St.) **34**; (50 Ohio St.) **40**; (51 Ohio St.) **46**; (52 Ohio St.) **49**; (53 Ohio St.) **53**; (54 Ohio St.) **56**; (55, 56 Ohio St.) **60**; (57 Ohio St.) **63**; (58 Ohio St.) **65**; (59 Ohio St.) **69**; (60 Ohio St.) **71**.

OREGON. — (15) **3**; (16) **8**; (17) **11**; (18) **17**; (19) **20**; (20) **23**; (21) **26**; (22) **29**; (23) **37**; (24) **41**; (25) **42**; (26) **46**; (27) **50**; (28) **52**; (29) **54**; (30) **60**; (31) **65**; (32) **67**; (33) **72**.

PENNSYLVANIA. — (115, 116, 117 Pa. St.) **2**; (118, 119 Pa. St.) **4**; (120, 121 Pa. St.) **6**; (122 Pa. St.) **9**; (123, 124 Pa. St.) **10**; (125 Pa. St.) **11**; (126 Pa. St.) **12**; (127 Pa. St.) **14**; (128, 129 Pa. St.) **15**; (130, 131 Pa. St.) **17**; (132, 133, 134 Pa. St.) **19**; (135, 136 Pa. St.) **20**; (137, 138 Pa. St.) **21**; (139, 140, 141 Pa. St.) **23**; (142, 143 Pa. St.) **24**; (144, 145 Pa. St.) **27**; (146 Pa. St.) **28**; (147, 150 Pa. St.) **30**; (151 Pa. St.) **31**; (148 Pa. St.) **33**; (149, 152, 153 Pa. St.) **34**; (154, 155 Pa. St.) **35**; (156 Pa. St.) **36**;

(157 Pa. St.) 37; (158 Pa. St.) 38; (159 Pa. St.) 39; (160 Pa. St.) 40; (161 Pa. St.) 41; (162 Pa. St.) 42; (163 Pa. St.) 43; (164, 165 Pa. St.) 44; (166 Pa. St.) 45; (167 Pa. St.) 46; (168, 169 Pa. St.) 47; (170, 171 Pa. St.) 50; (172, 173 Pa. St.) 51; (174, 175 Pa. St.) 52; (176 Pa. St.) 53; (177 Pa. St.) 55; (178 Pa. St.) 56; (179, 180 Pa. St.) 57; (181 Pa. St.) 59; (182 Pa. St.) 61; (183, 184 Pa. St.) 63; (185 Pa. St.) 64; (186 Pa. St.) 65; (187 Pa. St.) 67; (188 Pa. St.) 68; (189 Pa. St.) 69; (190 Pa. St.) 70; (191 Pa. St.) 71; (192 Pa. St.) 73; (193 Pa. St.) 74.

RHODE ISLAND. — (15) 2; (16) 27; (17) 33; (18) 49; (19) 61.

SOUTH CAROLINA. — (26) 4; (27, 28, 29) 13; (30) 14; (31, 32) 17; (33) 26; (34) 27; (35) 28; (36) 31; (37) 34; (38) 37; (39) 39; (40) 42; (41) 44; (42) 46; (43) 49; (44) 51; (45) 55; (46) 57; (47) 58; (48) 59; (49) 61; (50) 62; (51) 64; (52) 68; (53) 69; (54) 71; (55) 74.

SOUTH DAKOTA. — (1) 36; (2) 39; (3) 44; (4) 46; (5) 49; (6) 55; (7) 58; (8) 59; (9) 62; (10) 66; (11) 74.

TENNESSEE. — (85) 4; (86) 6; (87) 10; (88) 17; (89) 24; (90) 25; (91) 30; (92) 36; (93) 42; (94) 45; (95) 49; (96) 54; (97) 56; (98) 60; (99) 63; (100) 66; (101) 70; (102) 73.

TEXAS. — (68) 2; (69, 24 Tex. App.) 5; (70; 25, 26 Tex. App.) 8; (71) 10; (27 Tex. App.) 11; (72) 13; (73, 74) 15; (75) 16; (76) 18; (77; 28 Tex. App.) 19; (78) 22; (79) 23; (29 Tex. App.) 25; (80, 81) 26; (82) 27; (30 Tex. App.) 28; (83) 29; (84) 31; (85) 34; (31 Tex. Cr. Rep.; 86) 37; (86; 32 Tex. Cr. Rep.) 40; (87; 33 Tex. Cr. Rep.) 47; (34 Tex. Cr. Rep.; 88) 53; (89, 90) 59; (35 Tex. Cr. Rep.) 60; (36 Tex. Crim. Rep.) 61; (91; 37 Tex. Crim. Rep.) 66; (38 Tex. Crim. Rep.) 70; (92) 71; (39 Tex. Crim. Rep.) 73.

UTAH. — (13) 57; (14) 60; (15) 62; (16) 67; (17) 70; (18) 72.

VERMONT. — (60) 6; (61) 15; (62) 22; (63) 25; (64) 33; (65) 36; (66) 44; (67) 48; (68) 54; (69) 60; (70) 67.

VIRGINIA. — (82) 3; (83) 5; (84) 10; (85) 17; (86) 19; (87) 24; (88) 29; (89) 37; (90) 44; (91) 50; (92) 53; (93) 57; (94, 95) 64; (96) 70.

WASHINGTON. — (1) 22; (2) 26; (3) 28; (4) 31; (5) 34; (6) 36; (7) 38; (8) 40; (9) 43; (10) 45; (11) 48; (12) 50; (13) 52; (14) 53; (15) 55; (16) 58; (17) 61; (18) 63; (19) 67; (20) 72.

WEST VIRGINIA. — (29) 6; (30) 8; (31) 13; (32, 33) 25; (34) 26; (35) 29; (36) 32; (37) 38; (38, 39) 45; (40) 52; (41) 56; (42) 57; (43) 64; (44) 67; (45) 72.

WISCONSIN. — (69) 2; (70, 71) 5; (72) 7; (73) 9; (74, 75) 17; (76, 77) 20; (78) 23; (79) 24; (80) 27; (81) 29; (82) 33; (83) 35; (84) 36; (85, 86) 39; (87) 41; (88) 43; (89) 46; (90) 48; (91) 51; (92) 53; (93) 57; (94) 59; (95) 60; 96, (97) 65; (98, 99) 67; (100) 69; (101) 70; (102) 72; (103) 74.

WYOMING. — (3) 31; (4) 62; (5) 63; (6) 71.

AMERICAN STATE REPORTS.

VOL. LXXIV.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Acrumen v. Barnes.....	<i>Homesteads</i>	66 Ark. 442.....	104
Aldine Mfg. Co. v. Phillips.....	<i>Liens</i>	118 Mich. 162...	380
Alie v. Nadeau.....	<i>Judgments</i>	93 Me. 282.....	346
Allen v. Allen.....	<i>Gifts Causa Mortis</i> ..	75 Minn. 116...	442
Allen v. Caylor.....	<i>Vendor and Vendee</i> ..	120 Ala. 251.....	31
Aye v. Philadelphia Co.....	<i>Oil Leases</i>	193 Pa. St. 451 ..	696
Baker v. Allen.....	<i>Waters</i>	66 Ark. 271....	93
Barker v. Southern Ry. Co.....	<i>Deeds</i>	125 N. C. 596....	658
Barnes v. Black.....	<i>Fraud, Conveyances</i> ..	193 Pa. St. 447..	694
Beck v. Railway etc. Union.....	<i>Boycotts</i>	118 Mich. 497....	421
Belfast Sav. Bank v. Lancey.....	<i>Insolvency</i>	93 Me. 422.....	361
Benson v. Chicago etc. R. R. Co...	<i>Hand-cars</i>	75 Minn. 163....	444
Best v. Smith.....	<i>Gift to Wife</i>	193 Pa. St. 89...	676
Black Hills etc. Co. v. Mitchell...	<i>Garnishment</i>	11 S. Dak. 615..	830
Bordeaux v. Greene.....	<i>Easements</i>	22 Mont. 254....	600
Breton, Petitioner.....	<i>Concurrent Sentences</i>	93 Me. 39.....	335
Burden v. State.....	<i>Forgery</i>	120 Ala. 388....	37
Burney v. Allen.....	<i>Wills</i>	125 N. C. 314 ...	637
Cameron v. Kenyon-Connell Com. } Co.....	<i>Corporations—Torts</i> ..	22 Mont. 312...	602
Carland v. Western Union Tel. Co.	<i>Tel. Companies</i>	118 Mich. 369...	394
Carson v. Fuller.....	<i>Executions</i>	11 S. Dak. 502..	823
Chapman v. Decrow.....	<i>Dogs</i>	93 Me. 378.....	357
Colip v. State.....	<i>Larceny</i>	153 Ind. 584....	322
Cook v. Forker.....	<i>Sunday Contracts</i> ..	193 Pa. St. 461..	699
Cornell v. Franklin.....	<i>Appeal</i>	40 Fla. 149....	131
Danforth v. McCook County.....	<i>Taxes</i>	11 S. Dak. 258..	808
Davis v. Webber.....	<i>Attorney and Client</i> ..	66 Ark. 190....	81
Dell Rapids etc. Co. v. Dell Rapids.	<i>Mun. Corporations</i> ..	11 S. Dak. 116..	783
Dickson v. Kittson.....	<i>Savings Banks</i>	75 Minn. 168....	447

NAME.	SUBJECT.	REPORT.	PAGE.
Eingartner v. Illinois Steel Co....	<i>Limitation of Actions</i>	103 Wis. 373....	871
Elrod v. Hamner.....	<i>Detinue</i>	120 Ala. 463....	43
Feige v. Burt.....	<i>Pledge of Stock</i>	118 Mich. 243 ...	390
Florida Southern R. R. Co. v. Hill..	<i>Railroads</i>	40 Fla. 1.....	124
Forest City Ins. Co. v. Hardesty...	<i>Fire Insurance</i>	182 Ill. 39.....	161
Fulton v. State.....	<i>Justice of Peace</i>	103 Wis. 238....	854
Gage v. Harvey.....	<i>Intoxicating Liquors</i> ..	66 Ark. 68.....	70
Gile v. Atkins.....	<i>Liens</i>	93 Me. 223.....	341
Gleason v. Sanitary Milk Supply Co.	<i>Neg. Instruments</i> ...	93 Me. 541.....	370
Goodwin v. McMinn.....	<i>Trusts</i>	193 Pa. St. 646..	703
Greenleaf v. Gallagher.....	<i>Sales</i>	93 Me. 549.....	371
Hamilton v. Phillips.....	<i>Judgments</i>	120 Ala. 177.....	29
Harding v. American Glucose Co..	<i>Monopolies</i>	182 Ill. 551.....	189
Hill v. Reynolds.....	<i>Sheriff's Deeds</i>	93 Me. 25.....	329
Hiner v. Whitlow.....	<i>Usury</i>	66 Ark. 121....	74
Holt v. Couch.....	<i>Partition</i>	125 N. C. 456....	648
Indianapolis Union Ry. Co. v. Dohn	<i>Monopolies</i>	153 Ind. 10.....	274
In re Donges' Estate.....	<i>Wills</i>	103 Wis. 497.....	885
Jenkins v. Daniel.....	<i>Suretyship</i>	125 N. C. 161....	632
Johnson v. Glidden.....	<i>Parent and Child</i> ...	11 S. Dak. 237..	795
Johnson v. Minnesota Loan etc. Co.	<i>Executions</i>	75 Minn. 4.....	438
Jones v. Home Sav. Bank.....	<i>Trusts</i>	118 Mich. 155...	377
Kansas City etc. R. R. Co. v. } Southern Ry. etc. Co.....	<i>Indemnity Contract</i> ..	151 Mo. 373.....	545
Kenck v. Parchen.....	<i>Administrators</i>	22 Mont. 519...	625
Kidd v. Bates.....	<i>Executors & Adm'rs</i> ..	120 Ala. 79.....	17
Kingman v. Mowry.....	<i>Fraud. Conveyances</i> ..	182 Ill. 256.....	169
Kowalke v. Milwaukee etc. Ry. Co.	<i>Mistake</i>	103 Wis. 472....	877
Lefler v. State.....	<i>False Pretenses</i>	153 Ind. 82.....	300
Lippman v. First Nat. Bank.....	<i>Exemptions</i>	120 Ala. 125.....	28
Lockard v. Stephenson.....	<i>Wills</i>	120 Ala. 641....	63
Lyman v. Gaar.....	<i>Attachment</i>	75 Minn. 207...	452
Malott v. Shimer.....	<i>Negligence</i>	153 Ind. 35.....	278
Mather v. Curley.....	<i>Tax Sale</i>	75 Minn. 248...	462
Mather v. Dunn.....	<i>Cotenancy</i>	11 S. Dak. 196..	788
Matson v. Travelers' Ins. Co.	<i>Accident Insurance</i> ..	93 Me. 469.....	368
McBryde v. South Carolina Ins. Co.	<i>Insurance</i>	55 S. C. 589....	769
McCafferty v. Pennsylvania R. R. } Co.....	<i>Injury to Passenger</i> ..	193 Pa. St. 339...	690
McClain v. Williams.....	<i>Innkeeper's Lien</i>	11 S. Dak. 227..	791
McConville v. St. Paul.....	<i>Assessments</i>	75 Minn. 383...	508
McCormick etc. Co. v. Halvorson..	<i>Justice of Peace</i>	11 S. Dak. 427..	820
McDonald v. Fuller.....	<i>Executions</i>	11 S. Dak. 355..	815
McGovern v. McGovern.....	<i>Wills</i>	75 Minn. 314...	489
McNair v. Moore.....	<i>Neg. Instruments</i> ...	55 S. C. 435....	760
Mercer v. State.....	<i>Husband and Wife</i> ..	40 Fla. 216.....	135

NAME.	SUBJECT.	REPORT.	PAGE.
Merrell v. Witherby.....	<i>Statute of Frauds.</i>	120 Ala. 418.....	39
Metropolitan Nat. Bank v. Merchants' Nat. Bank.....	{ <i>Banks.</i>	182 Ill. 367.....	180
Meuer v. Chicago etc. Ry. Co.....		<i>Evidence.</i> 11 S. Dak. 94....	774
Mielke v. Chicago etc. R. R. Co.....	<i>Master and Servant.</i>	103 Wis. 1.....	834
Minnesota Butter etc. Co. v. St. Paul etc. Co.....	{ <i>Warehousemen</i>	75 Minn. 445....	515
Moyer v. Koontz.....		<i>Divorce.</i> 103 Wis. 22.....	837
Myers v. Southwestern Nat. Bank.....	<i>Forged Checks.</i>	193 Pa. St. 1....	672
National Bank v. American Exch. Bank.....	{ <i>Banks—Collections.</i>	151 Mo. 320.....	527
Norris v. Hartford Fire Ins. Co.....		<i>Insurance.</i> 55 S. C. 450....	765
North Chicago St. R. R. Co. v. Zeiger.....	{ <i>Damages</i>	182 Ill. 9.....	157
Northern Cent. Ry. Co. v. Walworth.....		<i>Specific Performance.</i>	193 Pa. St. 207.. 683
Northport etc. Assn. v. Perk ins.....	<i>Corporations.</i>	93 Me. 235.....	342
Owen v. Burlington etc. R. R. Co.....	<i>Chattel Mortgage.</i>	11 S. Dak. 153..	786
Patton v. Ludington.....	<i>Wills</i>	103 Wis. 629....	910
People v. Phillips.....	<i>Forgery.</i>	118 Mich. 699....	436
Peterson v. Western Union Tel. Co.....	<i>Libel.</i>	75 Minn. 368....	502
Pewaukee v. Savoy.	<i>Waters.</i>	103 Wis. 271....	859
Preston v. Bosworth.....	<i>Conditions.</i>	153 Ind. 458....	313
Prieve v. Wisconsin State Land etc. Co.....	{ <i>Waters.</i>	103 Wis. 537....	904
Progress etc. Co. v. Gratiot etc. Co.....		<i>Mechanic's Lien</i>	151 Mo. 501..... 557
Pullman etc. Co. v. Adams.....	<i>Sleeping-car Co's.</i>	120 Ala. 581	53
Rockefeller v. Dellinger.....	<i>Partnership.</i>	22 Mont. 418....	613
Romer v. St. Paul City Ry. Co.....	<i>Nuisance</i>	75 Minn. 211....	455
Roulston v. Hall.....	<i>Husband and Wife</i>	66 Ark. 305....	97
Russell v. State.....	<i>Bigamy</i>	66 Ark. 185	78
Sherer v. Sherer.....	<i>Appeal.</i>	93 Me. 210.....	339
Sherrard v. Johnston.....	<i>Executions</i>	193 Pa. St. 166..	680
Slack v. Northwestern Nat. Bank.....	<i>Insolvency</i>	103 Wis. 57.....	841
Snow v. Russell.....	<i>Judicial Sales.</i>	93 Me. 362.....	350
Solomon v. American Mercantile Exchange	{ <i>Libel.</i>	93 Me. 436.....	366
Soper v. Creighton.....		<i>Sales.</i> 93 Me. 564	375
Springfield etc. Co. v. Traders' Ins. Co.....	{ <i>Fire Insurance.</i>	151 Mo. 90.....	521
Stadler v. First Nat. Bank.....		<i>Neg. Instruments.</i>	22 Mont. 190... 582
Standard etc. Ins. Co. v. Schmaltz.....	<i>Accident Insurance.</i>	66 Ark. 588....	112
State v. Bolte.....	<i>Mandamus.</i>	151 Mo. 362.....	537
State v. Bouknight.....	<i>Trial.</i>	55 S. C. 353....	751
State v. Cone.....	<i>Mandamus.</i>	40 Fla. 409....	150
State v. Davis	<i>Counties.</i>	11 S. Dak. 111..	780
State v. Hawkins.....	<i>Trespass.</i>	125 N. C. 690...	669
State v. Langford.....	<i>Larceny of Dog.</i>	55 S. C. 322....	746
State v. McGee.....	<i>Criminal Trial</i>	55 S. C. 247....	741

NAME.	SUBJECT.	REPORT.	PAGE.
State v. Portland Natural Gas etc. Co.	} <i>Quo Warranto</i>	153 Ind. 483.....	314
State v. Sharp.....			
State v. Sixth Judicial Dist. Court.	<i>Highways</i>	125 N. C. 628....	663
State v. Sloan	<i>Appeal Bonds</i>	22 Mont. 449....	618
State v. Sumner	<i>Constitutional Law</i> ..	66 Ark. 575....	106
State v. Steele	<i>Homicide</i>	55 S. C. 32.....	707
Steele v. Southern Railway	<i>Passengers</i>	55 S. C. 389....	756
Stephenson v. Boards of Election Commissioners.	} <i>Political Conventions</i> ..	118 Mich. 396 ...	402
Stigers v. Dinsmore.....			
St. Louis Fair Assn. v. Carmody ..	<i>Devises</i>	193 Pa. St. 482..	702
Svanburg v. Fosseen.....	<i>Illegal Contracts</i> ...	151 Mo. 566....	571
Texarkana v. Leach.....	<i>Specific Performance</i>	75 Minn. 350... 490	
Valparaiso v. Hagen.	<i>Mun. Corporations</i> ..	66 Ark. 40.....	68
Van Duzen-Harrington Co. v. Jungeblut	} <i>Mun. Corporations</i> ..	153 Ind. 337.....	305
Vega Steamship Co. v. Consoli- dated Elev. Co			
Weaver v. Weaver.....	<i>Brokers</i>	75 Minn. 298 ...	463
Weeks & Potter Co. v. Elliott....	} <i>Constitutional Law</i> ..	75 Minn. 308... 484	
Weil v. Casey			
West v. Hayes.....	<i>Gifts</i>	182 Ill. 287.....	173
Western Assur. Co. v. Hall.....	<i>Husband and Wife</i> ..	93 Me. 286.....	348
Whereatt v. Ellis.....	<i>Judgments</i>	125 N. C. 336	644
White v. Fox.....	<i>Detinue</i>	120 Ala. 92.....	24
White v. Underwood.....	<i>Fire Insurance</i>	120 Ala. 547.....	48
White Sewing Machine Co. v. Wooster.....	<i>Appeal Bonds</i>	103 Wis. 348....	865
Williams v. Daubner	<i>Trespass</i>	125 N. C. 544....	654
Williams v. State.....	<i>Service of Process</i> ..	125 N. C. 25.....	630
Williamson v. Lazarus.....	} <i>Homesteads</i>	66 Ark. 382....	100
Winn v. Riley.....			
Witte v. Koepfen.....	<i>Deeds—Delivery</i>	103 Wis. 521....	902
Zinc Carbonate Co. v. First Nat. Bank.....	<i>Larceny</i>	40 Fla. 480.....	154
	<i>Curative Acts</i>	66 Ark. 226....	91
	<i>Husband and Wife</i> ..	151 Mo. 61.....	517
	<i>Witnesses</i>	11 S. Dak. 598..	856
	} <i>Corporations</i>	103 Wis. 125....	845

AMERICAN STATE REPORTS.

VOL. LXXIV.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

KIDD v. BATES.

[120 ALABAMA, 72.]

A STATUTE IN MODIFICATION OR DEROGATION OF THE COMMON LAW will not be presumed to alter it further than is expressly declared.

EXECUTORS AND ADMINISTRATORS—WHO MAY ACT. At common law, all persons except idiots and lunatics were competent to act as executors; neither infancy, nonresidence, coverture, intemperance, improvidence, ignorance, vice, dishonesty, nor any degree of moral guilt or delinquency, disqualified one for the office.

EXECUTORS AND ADMINISTRATORS—COMPETENCY—STATUTORY CONSTRUCTION.—A statute, one section of which empowers a court to appoint as executors persons named in a will if they are fit persons, and a subsequent section of which enumerates the persons who are not deemed fit, vests in the court a discretion to determine the existence of the particular causes of disability enumerated, but does not vest a broad discretion to determine what are causes of disability.

EXECUTORS AND ADMINISTRATORS—WHO MAY ACT. UNDER A STATUTE which provides that a probate court may appoint as executors persons named in a will if they are fit persons, and which also enumerates the causes which will render persons incompetent to act, a probate court has no authority to refuse to issue letters of administration to a person because his interests are hostile to those of the estate and the legatees under the will, where such a cause is not one of the disqualifications enumerated in the statute.

Gunter & Gunter, for the appellants.

Tompkins & Troy, for the appellee.

⁸¹ **BRICKELL, C. J.** Horatio B. Tulane died in October, 1897, leaving a last will and testament in which Louis A. Bates

and Louisa V. Kidd were named as executor and executrix. After the probate of the will ⁸² Louis A. Bates made application for letters testamentary, which application was contested by appellants, Louisa V. Kidd and Louis S. Kidd, heirs at law of testator and legatees under the will, who filed objections to the issue of letters testamentary to said Bates, and asked that said application be refused. The substance of these objections is, that while the testator was in a very weak condition of body and mind, caused by age and disease, and was in the care and under the control and dominion of said Bates, who occupied toward him the relation of confidential agent and companion, transacting much of his business, the latter, by the exercise of fraud and undue influence, induced testator to lend him at various times, without security, large sums of money, aggregating more than one hundred thousand dollars; and that subsequently the said Bates induced testator to accept as security for sixty-four thousand dollars of said indebtedness a like amount of the bonds of a Tennessee corporation called the Tulane Hotel Company, and thereafter, in September, 1897, while testator was at said hotel, still weak in mind and body, and in the care of and being nursed by the said Bates and others acting for him, who excluded from his presence his friends and acquaintances, he was induced, by the exercise of fraud and undue influence, to execute an instrument by which said sixty-four thousand dollars of bonds were donated to said Tulane Hotel Company, of which corporation Bates was the president, and the entire capital stock of which he owned. It is further averred that by reason of the facts above stated the said Bates is indebted to the estate in a sum exceeding one hundred thousand dollars, but that he denies that he is indebted to it in any amount, and claims that all the money alleged to have been loaned to him was, in fact, donated to said Tulane Hotel Company, by reason of which adverse claim the interest of Bates is antagonistic and hostile to that of the estate and the legatees under the will, and litigation between Bates and the estate is necessary to determine the fact and amount of said indebtedness, which litigation would be embarrassed by the issue of letters testamentary to the applicant. To these objections appellee demurred, and the sustaining of the demurrer and issue of letters to him are the only errors assigned.

⁸³ The first ground of demurrer is too general to be considered, and the others present the single question whether, upon an application for letters testamentary by the person

named as executor in the will, the court has authority to refuse to issue the letters to such person for any other causes than those specified in the statute. The statutes affecting the question presented, as found in the code of 1896, are as follows:

"Sec. 45. Whenever a will has been admitted to probate in this state, the judge of the court in which the will was probated may issue letters testamentary, according to the provisions of this chapter, to the person named as executors in such will, if they are fit persons to serve as such.

"Sec. 46. No person must be deemed a fit person to serve as executor who is under the age of twenty-one years, or who has been convicted of an infamous crime, or who, from intemperance, improvidence, or want of understanding, is incompetent to discharge the duties of the trust."

"Sec. 48. If the person named in the will as the sole executor is, or if all the persons named therein as executors are, from any of the causes enumerated in the second preceding section, unfit to serve as executor or executors, letters of administration, with the will annexed, may be granted on the testator's estate under the provisions of section 53."

Section 47 prescribes the form of letters testamentary, and other sections of the chapter provide for the grant of letters of administration with the will annexed, in the event of the death of the sole or surviving executor, or the renunciation of the right to act by the person named in the will.

The theory of counsel for appellants is, that the words "if they are fit persons to serve as such," contained in section 45, indicate a legislative intent to give a very broad discretion to the court in determining what are causes of disability and who are fit persons to serve as executors, and that section 46 was intended not to define all the causes of disability which should authorize the rejection of persons who apply for letters, but only to limit this discretion to the extent of forbidding the issue of letters to one who was under twenty-one years of age, or who had been convicted of an infamous crime, or who from intemperance, improvidence, or want of understanding, ⁸⁴ was incompetent to discharge the duties of the trust. If section 45 stood alone, we would be inclined to adopt the construction contended for, and to declare that any cause which rendered the applicant unfit or unsuitable to serve as executor without detriment to the estate and undue advantage to himself would justify the refusal to issue letters testamentary to him. And

upon this construction we would have no difficulty in determining that the facts alleged, if true, render the applicant for letters an unsuitable person to discharge the duties of the trust, which require him to collect all the debts and other assets of the estate and preserve them for distribution according to the provisions of the will, since his interests are clearly adverse to the estate and antagonistic to the legatees and devisees and others interested therein. The decisions of the courts of all those states the statutes of which vest the court with the power and discretion to determine who are suitable persons to serve as executors so hold, and the correctness of these decisions cannot be doubted: *Winship v. Bass*, 12 Mass. 199; *Drake v. Green*, 10 Allen, 126; *Thayer v. Homer*, 11 Met. 110; *Kimball's Appeal*, 45 Wis. 391; *In re Gleason's Estate*, 17 Misc. Rep. 510; 41 N. Y. Supp. 418. But the several sections of the code referred to were adopted at the same time, are in *pari materia*, and must be construed together, and the construction of one, if doubtful, may be aided by a consideration of the words of, and the legislative intent indicated by, the others, and of the evil of the common law intended to be remedied. And a consideration of all the sections and of the common law relating to the subject, which they were intended to modify, leads to a conclusion which is opposed to the construction placed by counsel on section 45. It is a rule of statutory construction that a statute in modification or derogation of the common law will not be presumed to alter it further than is expressly declared. The presumption is, that the language and terms of the statute import the alteration or change it was designed to effect, and their operation will not be enlarged by construction or intentment: *Cook v. Meyer*, 73 Ala. 583; *Webb v. Mullins*, 78 Ala. 113. The rule of the common law was that all persons might be appointed executors ⁸⁵ who were capable of making a will. Neither infancy, nonresidence, coverture, intemperance, improvidence, ignorance, vice, dishonesty, nor any degree of moral guilt or delinquency disqualified one for the office. Idiots and lunatics were practically the only classes disqualified, and the rule now prevails generally that courts have no discretion in respect to the issue of letters to the persons nominated in the will, unless such persons are expressly disqualified or such discretion is vested by law, and the person appointed by the will cannot be rejected by the court except where the law expressly so provides: 1 *Woerner's American Law of Administration*, 503 et seq.; *Schouler on Executors and Administra-*

tors, secs. 32, 33; 1 Williams on Executors, 7th Am. ed., 269; Redfield on Wills, pt. 3, c. 2, sec. 3; Stewart's Appeal, 56 Me. 300; Smith's Appeal, 61 Conn. 420, and notes. Treating these several sections of the code as one statute, and construing accordingly, they not only fail to indicate any legislative intent to abrogate this rule of the common law and vest a broad discretion in the court to determine what are causes of disability, but they show that such effect was not within the contemplation of the legislature, and that the only discretion intended to be conferred was that to be exercised in the determination of the existence of those particular causes of disability enumerated in section 46. The evil of the common law intended to be remedied by the statute was, that persons were permitted to serve as executors who were clearly unfit to serve as such without undue advantage to themselves and consequent detriment to the estate. The purpose of the statute was, therefore, not to declare, except indirectly by the process of exclusion, who were fit and competent persons to discharge the duties of the trust, since the common law declared all persons competent except idiots and lunatics, but to enumerate the causes which should render persons incompetent. In so far as it enumerates causes of disability not recognized at the common law, it must be treated as exclusive, containing all the causes which will authorize the rejection of the persons named in the will, and excluding all others, and as leaving the common-law rule as to competency and fitness unchanged except in the particulars specified. That this was the intention ⁸⁶ of the legislature is, we think, made manifest by the provision of section 48 quoted above, which authorizes the grant of letters of administration with the will annexed only when the persons named in the will as executors are "from any of the causes enumerated in the second preceding section [section 46] unfit to serve." The probate court has, therefore, no statutory authority to issue letters of administration with the will annexed unless the person named as executor in the will was under twenty-one years of age, or had been convicted of an infamous crime, or was incompetent to discharge the duties of the trust by reason of intemperance, improvidence, or want of understanding, except in the event of the death of the executor, or his renunciation of the right to act, as provided in sections 51 and 54. This failure on the part of the legislature to confer authority to grant letters of administration with the will annexed, except in the cases mentioned, clearly indicates that no causes of disability which could give

rise to the necessity for the grant of such letters, other than those enumerated in section 46, were within the contemplation of the legislature when the act was adopted.

The question presented by the demurrer has been touched upon in two cases considered by this court, but cannot be said to have been adjudicated. In *Williams v. McConico*, 27 Ala. 572, appellant applied for letters of administration on the estate of her deceased husband, who had died intestate, and the application was contested on the ground of her unfitness. The evidence showed that she had been living apart from her husband for a long time previously to his death, and had manifested great animosity toward him, and that she "had funds in her hands belonging to her minor children by a former husband, of whom she was sole guardian when she married Williams, which she would not deliver up on settlement, and which she would hold against any other person offering to administer." In the opinion, which does not discuss the question at length, it was said: "It being established that she was the widow, she was the first person entitled to administer; and, under the law, every person is a fit person, unless disqualified by some one of the causes specified in section 1658: ⁸⁷ Code 1896, sec. 46. Allowing every legitimate inference in favor of the contestants upon the evidence offered by them, it is clear that it did not establish any ground of unfitness covered by the section of the code to which we have referred." In *Bingham v. Crenshaw*, 34 Ala. 683, it was held that previous intermeddling with the effects of the estate by the applicant did not, per se, disqualify him, but the court refused to decide "whether there are disqualifications for the office of administrator other than those enumerated in section 1658 of the code" (Code 1896, sec. 46), and referred to the case of *Williams v. McConico*, 27 Ala. 572. Our statute is a substantial copy of the New York statute, and is very similar to that of California. In the latter state, section 1349 of the Code of Civil Procedure authorizes the issue of letters testamentary to the persons named in the will as executors "who are competent to discharge the trust," and section 1350 is the same as our section 46, except that it adds to the causes of disability therein enumerated incompetency through want of integrity. In the case of *In re Bauquier's Estate*, 88 Cal. 302, the application for letters testamentary was contested on the ground that the applicant had, by the exercise of fraud and undue influence, induced the testator, in his lifetime, to turn over to him more than twelve thousand dollars in

money and property, and that he claimed adversely to the estate to be the owner of the money and property thus fraudulently obtained. The court held that the statute contained the only causes of disability which could authorize the rejection of the applicant, and that the objections to the granting of the application must be such as to show that the applicant was incompetent upon some one of the grounds specified in the statute. In the case of *In re Gleason's Estate*, 17 Misc. Rep. 510, 41 N. Y. Supp. 418, a petition was filed for the removal of an executor on the ground that he claimed the benefit of a contract between himself and the testator, as to which there was strong evidence that the testator was of unsound mind at the time of its execution, and by which the executor secured great pecuniary advantage to the detriment of the estate. The court held that such conduct on the part of the executor did not render him incompetent or disqualified within the meaning of subdivision 1 of section 2685 of the Code of Civil Procedure, ^{ss} which specifies the causes of disability, but that his continuing to claim the benefits of the contract was ground of removal under subdivision 2 of said section, which enumerates, among other causes of removal, unfitness for the due execution of the office by reason of his "having wasted or improperly applied the money or other assets in his hands, or invested money in securities unauthorized by law, . . . or by reason of other misconduct in the execution of his office, or dishonesty." Other decisions of the New York court indicate that the courts, in determining what are grounds for the refusal to grant letters testamentary or of administration, must be governed by the statute: *Emerson v. Bowers*, 14 N. Y. 449; *Coope v. Lowerre*, 1 Barb. Ch. 45; *Coggshall v. Green*, 9 Hun, 471; *In re Manley's Estate*, 12 Misc. Rep. 472; 34 N. Y. Supp. 258. See, also, *Berry v. Hamilton*, 12 B. Mon. 191, 54 Am. Dec. 515; *Smith's Appeal*, 61 Conn. 420. The statutes of these states being so similar to ours, the construction placed upon them is entitled to consideration and weight in construing our own; and, as it coincides with the result of our independent investigation of the question, we adopt it as the proper construction of sections 45 and 46 of the code of 1896. It results that the facts alleged do not show any legal cause of disability, nor any ground for the refusal to issue letters to appellee, and the demurrer was, therefore, properly sustained. Whether the question of appellee's liability to the estate by reason of the facts alleged can be adjudicated, notwithstanding the issue of letters constituting him

executor, and, if so, in what manner and by whom his liability can be enforced, we need not and do not now decide, but refer to the following authorities bearing on the question: *McGregor v. McGregor*, 35 N. Y. 220; *Smith v. Lawrence*, 11 Paige, 206; *In re Gleason's Estate*, 17 Misc. Rep. 510; 41 N. Y. Supp. 418.

Let the decree of the probate court be affirmed.

A CHANGE IN THE RULE OF THE COMMON LAW is not presumed from the enactment of a statute upon the same subject, unless the statute is explicit and clear in that direction: *People v. Palmer*, 100 N. Y. 110, 4 Am. St. Rep. 423; *State v. Wilson*, 43 N. H. 415, 82 Am. Dec. 163, and note.

EXECUTORS AND ADMINISTRATORS—WHO MAY ACT.—At common law, all persons may be made executors, except those specially disqualified. The number of persons so disabled is so small that practically it may be said that any person may be made an executor. Any person named as executor in a will is to be deemed competent, unless he is declared incompetent by statute; and it is the duty of a surrogate to grant letters to every person who is appointed executor in a will, who is not declared incompetent by statute. He has no discretion in the matter, but must obey the requirement of the law: *Berry v. Hamilton*, 12 B. Mon. 191, 54 Am. Dec. 515, and note, 518, 519.

WEST v. HAYES.

[120 ALABAMA, 92.]

DETINUE—SEIZURE OF PROPERTY.—A PLEA OF JUSTIFICATION under legal process must set forth matter which, if proved, would constitute a full defense to the action.

EXECUTION IN DETINUE—PROTECTION OF OFFICER. A court has no jurisdiction to issue a writ ordering the seizure of property while in the rightful possession of one not a party to the suit, between whom and the defendant therein there is no privity, and whose possession began previously to the commencement of the suit and continued during its pendency, and a sheriff being charged with knowledge of such want of jurisdiction, is not protected by such process.

TRESPASS—SEIZURE OF PROPERTY IN DETINUE—JUSTIFICATION OF OFFICER—PLEADING.—In an action of trespass for the wrongful seizure of property under a writ issued on a judgment in detinue, a plea of justification, which shows that the plaintiff was not a party to the writ, is insufficient without an averment of facts to show that the property was, notwithstanding, subject to seizure while in his possession.

EXECUTION ON PERSONAL PROPERTY—FIXTURES.—Under a writ for the seizure of personal property, real property cannot be seized, and, to justify the seizure of a fixture under such a writ, facts must be averred to show that the circumstances of the attachment to the land were such that, in law, its character as personal property was not changed.

W. S. Cary, for the appellant.

William A. Collier, for the appellees.

⁹⁶ BRICKELL, C. J. Appellant's intestate, M. A. West, sued to recover damages for a trespass alleged to have been committed by appellee under color of his office as sheriff of Chilton county. The principal question presented for consideration is whether, under a writ for the seizure and delivery of personal property, regular on its face and issued by competent authority to carry into effect a judgment for the recovery of said property, the sheriff is justified in seizing said property wherever and in whosoever possession the same may be found, notwithstanding the person from whose possession it is taken may have been rightfully in possession thereof. The writ, which is set out in the special pleas justifying the seizure under legal process, commanded the sheriff "to seize and deliver to H. C. Reynolds [the property described therein], which said property the said H. C. Reynolds recovered of G. G. West, J. B. Hill, and Thomas Prestridge by the judgment of the circuit court of Chilton county, Alabama, on the fourteenth day of May, 1890." The pleas averred that the property described in the writ was situated on the land described in the complaint, but that it was not the property of the plaintiff, and that in obedience to the mandate of the writ the sheriff entered upon said land and seized the property and delivered it to H. C. Reynolds, using no more force than was necessary. But it does not appear from the plea that the property described in the writ was the same as that described in the complaint, nor are any facts averred tending to show that plaintiff's intestate was a party to the suit in which was rendered the judgment upon which said writ was issued, or had any privity with the defendants in said suit, or that his possession was the possession of said defendants, or that he came into possession while said suit was pending, or that he was not rightfully in possession thereof.

A plea of justification under legal process must set forth matter which, if proved, would constitute a full defense to the action. If the plaintiff in the action is a ⁹⁷ stranger to the writ, the plea should aver facts to show that the property taken was the property of the defendant in the process and was subject to seizure thereunder: *Daniel v. Hardwick*, 88 Ala. 559. It is clear that the pleas interposed in this case were defective for the reasons specified in the demurrer, unless, as contended by appellee, the writ under which he seeks to justify was such

as to authorize him to seize the property wherever it might be found, even though in the rightful possession of a stranger to the writ. A sheriff is undoubtedly protected as to all acts done by him in obedience to the mandate of a legal process, regular on its face and issued by competent authority. But, ordinarily, a writ issued to carry into effect the judgment of a court runs only against the parties named therein as defendants, and is not regular on its face so far as concerns strangers not named therein, and does not authorize, and will not justify, its execution against strangers thereto: *Albright v. Mills*, 86 Ala. 328. The writ set out in the plea was, on its face, but a species of execution, authorized by the statute to carry into effect the judgment of the court in favor of the plaintiff in an action to recover specific personal property, wherein H. C. Reynolds was plaintiff and G. G. West, J. B. Hill, and Thomas Prestridge were defendants, and was in the form prescribed by statute: Code 1896, secs. 1483, 1880; Code 1886, secs. 2723, 2882. The judgment in such cases is that the plaintiff have and recover of the defendant the property sued for, and the writ for the seizure and delivery to the plaintiff of the property recovered should follow and be construed according to the judgment. The court from which the writ issues has no jurisdiction to order the seizure of the property while in the rightful possession of one who was not a party to the suit, between whom and the defendant therein there is no privity, and whose possession began previously to the commencement of the suit and continued during its pendency; and of this want of jurisdiction the sheriff in whose hands the writ is placed for execution is charged with knowledge: *Albright v. Mills*, 86 Ala. 328. Against the seizure of a property in the possession of such person the sheriff is not, therefore, protected by such process. The writ corresponds to the writ of *habere facias possessionem*, issued to carry ⁹⁸ into effect the judgment of the court in favor of the plaintiff in an action of ejectment, which directs the sheriff to deliver to the plaintiff the possession of the lands and tenements described therein. Such writ, like the writ for the seizure and delivery of personal property, does not, in express words, name the person from whom the possession is to be taken, but it is well settled that in the execution of the writ the officer is not authorized to eject from the lands or tenements described one who was not a party to the suit, who had no privity with the defendant therein, and whose possession was adverse to the defendant and anterior to the commencement of the suit. If

such person should be ejected, the court from which the writ issued would, upon proper application, promptly order a writ of restitution to restore to him the possession of the land: *Howard v. Kennedy*, 4 Ala. 592, 39 Am. Dec. 307; *Smith v. Gayle*, 58 Ala. 600. The same principles must apply with respect to a writ for the seizure and delivery of personal property issued on a judgment rendered in an action of detinue. It appears from the plea that plaintiff's intestate was not a party to the writ under which the defendants sought to justify the seizure of the property, an averment of facts to show that the property was, notwithstanding, subject to seizure while in his possession was essential to the sufficiency of the plea, and, as these facts were not averred, the demurrer should have been sustained.

The pleas, as answer to the first count of the complaint, which alleged that the property seized was a fixture attached to the land, should also have averred facts to show that the circumstances under which it was attached to the land were such that, in law, its character as personal property was not changed. Under a writ for the seizure of personal property, real property cannot be seized. But this objection was not raised by the demurrer, and cannot, therefore, be considered in this court as ground for reversal.

Reversed and remanded.

JUSTIFICATION OF OFFICERS UNDER PROCESS.—Where an officer takes property not belonging to the party against whom the process runs, the taking is wrongful and the process affords him no protection: *Carpenter v. Inñes*, 16 Colo. 165, 25 Am. St. Rep. 255; nor will he be protected by an execution valid on its face if he has notice aliunde of some jurisdictional defect which may render the judgment void: *Grace v. Mitchell*, 31 Wls. 533, 11 Am. Rep. 613. For a full discussion of this question consult the monographic note to *Savacool v. Boughton*, 21 Am. Dec. 190-209; also, *Townsley-Myrick Co. v. Fuller*, 58 Ark. 181, 41 Am. St. Rep. 97.

FIXTURES—DETINUE OR REPLEVIN FOR.—Detinue does not lie for the recovery of fixtures which are attached to and a part of the realty: *McFadden v. Crawford*, 36 W. Va. 671, 32 Am. St. Rep. 894. Where things are affixed to the freehold, replevin will not lie; but, if they are severed after levy, they become personal property and may be replevied: *Cresson v. Stout*, 17 Johns. 116, 8 Am. Dec. 373.

LIPPMAN v. FIRST NATIONAL BANK OF ANNISTON.

[120 ALABAMA, 128.]

EXEMPTION OF PERSONAL PROPERTY—WAIVER OF POWER OF ATTORNEY.—Where a statute provides that one may waive his right of exemption as to personal property by an instrument executed by him, an agent of such a person, acting under a power of attorney, to manage all his principal's business, cannot execute a promissory note in the name of his principal, and in it waive his principal's right of exemptions, where the power of attorney does not expressly confer such a power, though the note itself is a binding obligation.

Joseph Carthel, A. P. Agee, W. S. Thorington, and Richard Fries, for the appellant.

John B. Knox, for the appellee.

120 HARALSON, J. A waiver of exemptions of personal property "may be made by a separate instrument in writing, subscribed by the party making the same, or it may be included in any bond, bill of exchange, promissory note, or other written contract executed by him": Code 1896, sec. 2105. This provision requires that the instrument shall be signed by the party making it. The intention to waive should be clearly expressed: *Knox v.* **127** *Wilson*, 77 Ala. 309; *Terrell v. Hurst*, 76 Ala. 588. If it be conceded that one may, by power of attorney, authorize another to make and sign a note for him, waiving his right of exemption as to personal property, the intention to waive the exemption should be as explicit or clearly expressed in the power for this purpose, as it is required to be when signed by the waivor himself. The power in this case was, "I, R. Lippman, do hereby constitute and appoint Marcus Lippman, with full power of substitution, attorney and agent for me and in my name, place, and stead, to manage and transact all business appertaining to the business done under the firm name of R. Lippman, in Anniston, Alabama." Here the power to waive the exemption is not only not expressed, but is only inferable as arising out of the necessity for making such a waiver in borrowing money as it might be deemed necessary by the agent, to successfully carry on the business. A waiver of exemption in a note signed by one partner in the name of the partnership, even if deemed by him to be necessary to carry on successfully the partnership business, is good only against the partner signing the note: *Terrell v. Hurst*, 76 Ala. 588; *Reed Lumber Co. v. Lewis*, 94 Ala. 626.

We are of the opinion that the waiver of exemptions against Mrs. Lippman contained in the note signed in her name by her said agent, was unauthorized under said power of attorney. This was the only issue in the case. That the note was otherwise a binding obligation on her is not denied. It results that the only error in the judgment rendered below lies in the declaration of a waiver of exemptions which is declared in it. The error will be corrected here, and the judgment modified by striking out the declaration of exemption in question; and, as thus corrected, the judgment of the city court is affirmed: *Reed Lumber Co. v. Lewis*, 94 Ala. 626.

Affirmed.

EXEMPTIONS—WAIVER OF.—An agreement in a note to waive the right of exemption as to personal property is invalid: *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66, and note. *Contra*, *Brown v. Leitch*, 60 Ala. 313, 31 Am. Rep. 42.

POWERS OF ATTORNEY RECEIVE A STRICT CONSTRUCTION, and the authority given by them is never extended by intendment or construction beyond that which is given in terms, or absolutely necessary to carry the authority into effect: *Gilbert v. How*, 45 Minn. 121, 22 Am. St. Rep. 724; *Campbell v. Foster Home Assn.*, 163 Pa. St. 609, 43 Am. St. Rep. 818, and note.

HAMILTON v. PHILLIPS.

[120 ALABAMA, 177.]

JUDGMENT LIEN — PROPERTY REMOVED FROM COUNTY.—A judgment lien, though suspended as to property removed from the county, is still a potential lien, and may be effectuated as against ad interim purchasers for value without actual notice through an execution sent to the county to which the property has been removed.

JUDGMENT LIEN—RIGHT AGAINST PURCHASER REMOVING PROPERTY FROM STATE.—If the power to effectuate a judgment lien is lost through the act of a third party in purchasing the property from the defendant and removing it from the state, the judgment lienholder may recover from such purchaser to the extent that he might have satisfied his judgment out of the property if it had not been removed, notwithstanding the purchaser had no actual notice of the lien.

JUDGMENT LIEN ON MORTGAGED PROPERTY—RIGHT AGAINST PURCHASER.—Where mortgaged property, which has subsequently become subject to a judgment lien, is purchased from the defendant and removed from the state, the judgment lienholder may recover from such purchaser to the extent the value of the property removed from the state was in excess of the amount due on the mortgage, although such purchaser may not have had actual notice of the judgment lien.

M. M. Miller, for the appellants.

Dortch & Martin, for the appellees.

¹⁸⁰ McCLELLAN, J. The city court erred in overruling the demurrer to defendants' second plea. It is immaterial whether a judgment or execution lien is suspended in a sense as to property removed from the county or not. Whether so or not it is still a potential lien, and may be effectuated as against ad interim purchasers for value without actual notice through an execution sent to the county to which the property has been removed: *Street v. Duncan*, 117 Ala. 571. And if the right and power thus to effectuate the lien is destroyed or lost through the act of a third person in purchasing the property from the defendant and removing it beyond the limits of the state, clearly the plaintiff in execution or registered judgment is thereby damaged to the extent that he might have satisfied his execution or judgment out of the property but for such removal, and may sue such third party and recover, notwithstanding there was no actual notice of plaintiff's lien. In such case, it would be obviously useless to issue execution to the sheriff of the county to which the property was removed since it ¹⁸¹ is no longer there, and could neither be taken in satisfaction nor further affected in respect of the lien. The plea in question, therefore, set up nothing in bar of plaintiffs' action, and the demurrer to it should have been sustained.

With this plea out of the case, the judgment of the city court, trial being without jury, cannot be sustained on the evidence. If it be conceded that defendants' mortgage to McBrayer was a bona fide and valid one—a question we leave to the city court on another trial—the plaintiffs here were damaged by the defendants to the extent the value of the property they removed from the state was in excess of the amount due on the mortgage. That is the amount plaintiffs could have realized out of the property by levy and sale but for the conduct of defendants, and they are entitled, on the assumption stated, to a judgment for at least that sum. That the property was worth and actually fetched more than the mortgage debt is clearly shown by the evidence. How much more the evidence does not with certainty disclose; but plaintiffs having made a prima facie case for the recovery of the full value of the property, it was upon the defendant to reduce the recovery by showing with certainty how much of the value of the property was not diverted from the satisfaction of the judgment lien, but properly

went to the superior mortgage lien. Failing in this, plaintiffs would be entitled to judgment for the full value of the property, not exceeding, of course, the sum secured by their lien. And so we might render judgment here; but, believing that the ends of justice may be better subserved by another trial in the city court, we will remand the cause. Reversed and remanded.

WHERE PERSONAL PROPERTY SUBJECT TO A LIEN OF FIERI FACIAS, which has attached, by the delivery of the writ, to the sheriff, is removed to another state and there sold, it may, if brought back to this state, be levied on and sold under an alias fieri facias: *McMahan v. Green*, 12 Ala. 71, 46 Am. Dec. 242.

ALLEN v. CAYLOR.

[120 ALABAMA, 251.]

STATUTE OF FRAUDS—PAROL AGREEMENT FOR PURCHASE OF INTEREST IN LANDS.—Where one loans money to a purchaser of lands who takes title in his own name, under an oral promise that the lender should have an interest in the land to the extent of his loan, such an agreement is only for the purchase of an interest in land, and being in parol, is not enforceable.

TRUST—RESULTING—MONEY LOANED TO PURCHASE LAND.—The contributing to the purchase of land of a sum of money which is not an aliquot part of the whole does not create a resulting trust in favor of the party so contributing.

VENDOR'S LIEN — SUBROGATION — PAROL AGREEMENT.—One who pays off a vendor's lien on land at the request of the debtor, upon an agreement that he shall have a lien for his reimbursement, is subrogated to the rights of the vendor in respect of the lien, though the agreement under which the purchase money was paid rested in parol.

VENDOR'S LIEN — ASSIGNMENT — STATUTE OF FRAUDS.—In equity, a vendor's lien is not considered an interest in land, and may be assigned in parol, without offending the statute of frauds.

TRUST—FIDUCIARY—WHEN NOT CREATED.—Where a purchaser of land is in the possession of the money of a third person which was not loaned or delivered to him, and applies it to the payment of the purchase money of the land, a fiduciary trust is not created in favor of such third person, since no fiduciary relation exists between him and the purchaser.

EQUITY PLEADING—ALTERNATIVE GROUNDS OF RELIEF.—Where the several grounds of relief stated in a bill in equity are alternative statements of one transaction, each alternative must be sufficient to give relief, or the whole bill is bad.

Parks & Son, for the appellant.

Hubbard & Hubbard, for the appellees.

²⁵³ HEAD, J. The bill filed by the appellee states in the alternative four grounds for relief. Stephen Jackson purchased a lot of three acres of land at the price of two hundred and eighty dollars, taking title to himself, and lived thereon until his death. The appellee, Mrs. Caylor, in her first ground, alleges that she let Jackson have one hundred dollars, which he paid on the purchase money of the lot, at his request, under agreement with him that she should have an interest in the lot to the extent of her money that was paid for the same, and she says the deed should have been taken in the names of both.

Her second ground is, that Jackson, being unable to pay one hundred dollars of the purchase money, applied to her for that sum to pay the same, promising that she should be interested in the land to the extent of the sum she might advance to pay the purchase money; that she paid off and discharged one hundred dollars of the purchase money under said request, agreement, and promise, which has never been repaid to her, and that she is entitled to an interest in the land to the extent of said sum, or that she has a lien on the land to that extent for the purpose of reimbursement.

Her third ground is, that after Jackson purchased, and paid one hundred and eighty dollars of the purchase money of the land, he became unable to pay, or did not have the money to pay, the balance of one hundred dollars, and requested her to pay the same, stating at the time that she should have a claim or lien on the land for the same, and that she paid the one hundred dollars in accordance with such request.

The bill states that all the foregoing agreements, directions, and promises were in parol and not in writing.

Her fourth ground is, that Jackson paid one hundred and eighty dollars of the purchase money; that he came into the possession of one hundred dollars of her money, which was not loaned to him nor delivered to him by her; that he took this money and ²⁵⁴ applied it to the payment of the purchase money of the land, thereby completing the payment of the purchase money.

The administrator and heirs of Jackson are parties defendant, and the prayer is for a decree requiring a conveyance to complainant of an interest in the land to the extent of the amount paid by her, or a decree holding that she has a lien on the land for that sum with interest, and that the land be sold to satisfy the same. Prayer for general relief is added.

The respondents demurred to the bill because of the parol

character of the alleged agreements sought to be enforced, and for multifariousness, in that it is sought to enforce said express agreements and also to establish an implied trust. The administrator demurs separately that he is not a proper party. The demurrers, which were to the whole bill, were overruled and respondents appeal.

The first and second grounds are clearly nothing more than efforts to specifically enforce a parol agreement for the purchase of an interest in land, which cannot be done under our system. They do not show resulting trusts, for the reason that complainant merely contributed a sum of money to the purchase, not being an aliquot part of the whole: *Bibb v. Hunter*, 79 Ala. 351; 10 Am. & Eng. Ency. of Law, 16.

The third shows that the vendor of Jackson had a vendor's lien on the land for one hundred dollars, which complainant paid off at the request of Jackson and under an agreement with him that she should have a claim or lien on the land for her reimbursement. This ground rests upon what is known as "conventional subrogation." Under that doctrine, a stranger paying off a vendor's lien at the instance of the debtor, and upon agreement that he shall have a lien for his reimbursement, stands in the shoes of the vendor, in respect of the lien. This subrogation is purely conventional; it results directly from the agreement; it is in effect, though not in form, an equitable assignment of the lien for the security of the advance, as in *McMillan v. Gordon*, 4 Ala. 716, where a stranger paying off part of a mortgage debt at the instance of the mortgagor and upon the latter's agreement ²⁵⁵ that a lien would be given him on the mortgaged premises, and that he should be repaid out of the proceeds of the sale, it was held that the payment did not extinguish the mortgage debt, and that the party paying was entitled in equity to a pro tanto assignment of the mortgage; and this, notwithstanding the agreement was not in writing. So, also, in *Fuller v. Hollis*, 57 Ala. 435, where the vendee of land holding a bond for titles procured Hollis to pay up the balance of purchase money due, agreeing that Hollis should have a lien on the land and should take the deed from the vendor and hold the same as an escrow or security for the amount so advanced to take up the note. The vendor executed the deed to the vendee, and turned it over into the hands of Hollis, who held it as agreed. It was held that Hollis had a lien on the land for the amount paid by him to the vendor. In these cases, though as to the vendors the debts were really paid, yet, by reason of the

agreements which were parts and parcels of the transactions and by which third parties were induced to make the payments, a principle of subrogation was applied; or, reaching the same result, the parties paying were treated as assignees of the vendors' liens.

There are many authorities on this subject fully recognizing this right of substitution, a clear insight into which will be found in 24 American and English Encyclopedia of Law, 290 et seq., where adjudged cases are cited and quoted from.

"Conventional subrogation, as its name imports, results from the agreement of the parties and can take effect only by agreement. The agreement is, of course, with the party to be subrogated, and, it seems, may be either by the debtor or creditor": 24 Am. & Eng. Ency. of Law, 292, note.

In a court of equity, a vendor's lien upon land, even like a mortgage on land, is regarded only as a security. Neither, in that forum, is considered an interest in land and either may be assigned in parol, without offending the statute of frauds. It is a mere equitable chose in action, enforceable in equity by him who is entitled to receive the money it secures.

It must be admitted that *Chapman v. Abrahams*, 61 Ala. 108, very nearly approached, if it was not a case ²⁵⁶ for the application of, the doctrine above expressed, and in that it was held that Lockhart, whom the vendee procured to pay off the purchase money, acquired no lien by doing so. The agreement with Mrs. Chapman, the vendee, and her husband was that, if Lockhart would pay the amount due the vendor, they would, at the time of the payment, execute to him, Lockhart, a mortgage on the land to secure it. Lockhart advanced the money to make the payment, but, it not being convenient to execute the mortgage then, the matter was deferred to a future day. On making the payment, the vendor executed and delivered a deed to Mrs. Chapman, the vendee. The mortgage was afterward executed by Mrs. Chapman and her husband to Lockhart in pursuance of their agreement, who afterward filed a bill to enforce it, claiming also a vendor's lien and seeking its enforcement. Both demands were denied. Stone, J., said: "The strongest view of the bill which can be taken—the one most favorable to appellant—is that Lockhart paid the money to Clark [the vendor] for and at the request of Mrs. Chapman. This extinguished the debt which Mr. and Mrs. Chapman owed, and created a new debt or legal liability to Lockhart. It was no transfer of the original demand to Lockhart. If such had been its effect, then

any defense which Chapman and wife might have against Clark could have been successfully urged against Lockhart. Paying the debt at request, Lockhart became a new creditor on a new consideration, and could not be affected by any infirmity in the original consideration. On such debt *indebitatus assumpsit* would lie in favor of Lockhart, irrespective of the character, form, or validity of the debt he had thus extinguished: 1 Chitty's Pleading, 100, 350. It did not transfer the debt or vendor's lien to Lockhart." There is cited in support of what is said, the cases of *Pettus v. McKinney*, 56 Ala. 41; *Foster v. Athenaeum*, 3 Ala. 302; *Dennis v. Williams*, 40 Ala. 633; *Conner v. Banks*, 18 Ala. 42, 52 Am. Dec. 209. The mortgage was held void because the land was the statutory separate estate of Mrs. Chapman.

The cases cited by the court as above stated are as follows: *Foster v. Athenaeum*, 3 Ala. 302, simply holds that a surety upon a note given for the purchase money of land paying ²⁵⁷ the note by virtue of his obligation as a surety acquires no lien on the land for reimbursement. Such, we believe, is the generally received rule. By becoming surety he undertook to pay the note; his payment as effectually discharged the debt as if paid by the principal. He was not brought into the transaction and procured to make the payment by the vendee upon express terms of being subrogated. We think the case cannot be considered as an authority against the doctrine of conventional subrogation. *Conner v. Banks*, 18 Ala. 42, 52 Am. Dec. 209, does not appear to be in point. It merely states *arguendo* in support of the continuance of a vendor's lien, where a transferee of the original purchase money note had taken a new note, that the lien is an incident to the debt and attends upon it until the debt is paid or extinguished, or the lien itself by contract is destroyed. *Dennis v. Williams*, 40 Ala. 633, involved no agreement for subrogation in favor of a third party paying the purchase money. The vendee whose note was held by the vendor for purchase money sold the land to a subpurchaser taking his note. Subsequently, the vendor surrendered to his vendee the latter's note and received from him, in exchange therefor, the subvendee's said note, and it was held that the debt due the original vendor was thereby extinguished and with it, of course, his lien as vendor. In *Pettus v. McKinney*, 56 Ala. 41, the vendor had obtained a decree in chancery subjecting the lands to sale for the payment of the purchase money, and the vendee paid the decree with money borrowed from a third person, giving his

note with a mortgage on the land and other property to secure payment of the money borrowed. It was held that the mortgagee, not having taken an assignment of the decree, could not claim to be subrogated to the vendor's rights against the land, but that he must rely alone on his mortgage. Subrogation was attempted by the mortgagee to avoid a homestead right subsequently asserted by the widow of the mortgagor; the claim of homestead being good against the mortgage, but not against the asserted vendor's lien, had such existed.

It seems clear that neither of these authorities relied upon to support *Chapman v. Abrahams*, 61 Ala. 108, at all conflicts with the cases of *McMillan v. Gordan*, 4 Ala. 716, ²⁵⁸ and *Fuller v. Hollis*, 57 Ala. 435. Their facts do not bring them under the doctrine of subrogation now under consideration; and we cannot think the court, in *Chapman v. Abrahams*, 61 Ala. 108, intended to conflict with those cases, for no reference is made to them, and the judge who delivered the opinion (Judge Stone) was also the author of the opinion in *Fuller v. Hollis*, 57 Ala. 435. We take it that in *Chapman v. Abrahams*, 61 Ala. 108, the agreement being to execute a mortgage for the reimbursement of Lockhart, which was done, the invalidity of the mortgage by reason of the marital incapacity of Mrs. Chapman to make it was no cause for broadening the agreement in support of the right of subrogation, even if an agreement for subrogation by a married woman, in respect of her separate estate, were not itself likewise void by reason of marital incapacity; that Lockhart must rely alone on the mortgage he contracted for and took, whether valid or invalid, thus bringing the case somewhat within the principle of *Pettus v. McKinney*, 56 Ala. 41. We hold, therefore, that the third ground of relief contains equity upon sufficient allegations.

The fourth ground seems to attempt to set up a fiduciary trust, but shows no fiduciary relation whatever between the parties. It is wholly bad.

The several grounds of relief are, manifestly, alternative statements of one matter or transaction. In fact, they are expressly stated in the bill so to be. In such case, each alternative must be sufficient to give relief, or the whole bill is bad; but the demurrers in the case do not raise that objection. It is demurred that the bill is multifarious in that it seeks, in the alternative, to enforce a void parol trust and also an implied trust in lands, and further that it seeks to enforce a verbal mortgage and, in the alternative, an implied trust. As we have seen, the first and

second grounds are no more than efforts to enforce specifically an agreement for the purchase of an interest in the lot, the third is for subrogation as herein discussed, and the fourth to establish a fiduciary trust. There is no effort to enforce a parol mortgage on the lot. The assignments of demurrer do not meet the case.

²⁵⁰ The personal representative is clearly a proper party to the bill.

The decretal order overruling the demurrers is affirmed, and the cause remanded.

STATUTE OF FRAUDS—AGREEMENTS TO PURCHASE LANDS.—An agreement by two persons to become joint purchasers of certain real estate, each party to furnish one-half the purchase money, is within the statute of frauds; and when, in pursuance of such agreement, a purchase is made in the name of one alone, although the other advances a part of the purchase money, a constructive trust that can be enforced is not created: *Green v. Drummond*, 31 Md. 71, 1 Am. Rep. 14.

RESULTING TRUSTS.—One buying lands with the money of another, and taking title in his own name, becomes trustee of a resulting trust in favor of the latter, even though he stood in no fiduciary character to the person whose money has been used: *Beck v. Uhrich*, 13 Pa. St. 636, 53 Am. Dec. 507.

A VENDOR'S LIEN IS NOT ASSIGNABLE: *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272, and note; *Hecht v. Spears*, 27 Ark. 228, 11 Am. Rep. 784. Compare *Moore v. Anders*, 14 Ark. 628, 60 Am. Dec. 551, and note.

VENDOR'S LIEN—SUBROGATION.—If a third person pays a debt at the debtor's request, upon an agreement with the latter that he shall be entitled to the benefit of the security held by the creditor, he is entitled, in equity, to be subrogated to the rights of the creditor: *Note to Home Sav. Bank v. Bierstadt*, 61 Am. St. Rep. 150.

BURDEN v. STATE.

[120 ALABAMA, 388.]

FORGERY—WHAT IS.—A writing, to be the subject of forgery, must, either upon its face or by reason of attendant circumstances, have, upon the assumption of its genuineness, a capacity to injure or defraud; and a writing in the words, "Mr. Holmes, Selma, Ala. Dear Sir: The value of this chain is \$10.00 (Ten)," is not a forgery, in the absence of extrinsic facts which, taken in connection with the paper, impart to it a capacity to injure or defraud.

Mallory, McLeod & Mallory, for the appellants.

Charles G. Brown, for the appellee

³⁸⁹ **McCLELLAN, C. J.** It may be that a writing in the following words, viz: "Mr. Holmes, Selma, Ala. Dear Sir: The

value of this chain is \$10.00 (Ten)"—is the subject of forgery under certain circumstances extrinsic to the paper itself—even this we do not decide, however—but it is most clear that on its face this writing, by whomsoever signed or purporting to be signed, does not create, discharge, increase, or diminish a money liability, or transfer or encumber property, or release or impair an existing claim to, or lien upon, property; and, if extrinsic facts exist which, taken in connection with the paper, impart to it a capacity to injure or defraud, they should have been averred in the indictment. No ³⁹⁰ such facts are alleged in this indictment, and, therefore, neither of its counts charge any offense: *Rembert v. State*, 53 Ala. 467, 25 Am. Rep. 639; *Dixon v. State*, 81 Ala. 61; *Williams v. State*, 90 Ala. 649.

The construction put upon the words "or any instrument or writing, being or purporting to be the act of another," in section 4720 of the code, would lead to this, that if a man signed the name of another to a statement that the earth is round, or that the moon is made of green cheese, or other like entirely innocuous assertion, by means of which there is no possibility of any person being injured or defrauded, he would be guilty of forgery. The statute is not open to such interpretation, we think; and we reiterate with respect to the present form of the provision what has been many times declared by this court—a writing, to be the subject of forgery, must, either upon its face or by reason of attendant circumstances have, upon the assumption of its genuineness, a capacity to injure or defraud.

The trial court erred in overruling the demurrer to the indictment. For this the judgment of conviction will be reversed and the cause will be remanded.

FORGERY CONSISTS in the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability: *People v. Bendit*, 111 Cal. 274, 52 Am. St. Rep. 186, and note. On the question of forgery, see the monographic notes to *Arnold v. Cost*, 22 Am. Dec. 306-321; *Hendricks v. State*, 8 Am. St. Rep. 466-470.

MERRELL v. WITHERBY.

[120 ALABAMA, 418.]

STATUTE OF FRAUDS—SALE OF LAND.—Where, upon the sale of land, a large part of the purchase money is paid, and the purchaser is put in possession, the contract may be in parol and is unaffected by the statute of frauds.

STATUTE OF FRAUDS—CONTRACT TO PAY DEBT OF ANOTHER—WHAT NOT.—Where a contract is founded upon a distinct consideration and is intended to create a debt against the party himself, the agreement is not within the statute of frauds, though the effect of the payment is to pay the debt of another.

CONTRACTS.—THE STATUTE OF FRAUDS has no application to executed, but to executory, contracts.

AGENCY—WHEN AGENT ALONE LIABLE ON NOTE.—When a sale is made to one who is acting as agent for a principal who is known to the vendor, and only the personal obligation of the agent is taken for the price of the property sold, the presumption arises that personal credit is given to the agent alone.

EQUITY PLEADING—WHEN BILL INSUFFICIENT.—A bill in equity is fatally defective unless it states the title or claim of the complainant with such certainty and clearness that the defendant may be distinctly informed of the nature of the case which he is called upon to meet.

Bill to enforce vendor's lien in favor of complainant, as assignee of a note given by W. R. Carter to the assignor, Green Merrell, in part payment for lands sold. Merrell sold land to Carter as agent for the defendants Witherby, Stoughton, and Goodwin, who paid part cash, and for the balance Carter gave his note for eighteen hundred and forty-nine dollars and seventy-five cents. The land was deeded to Carter and by Carter to Witherby, Stoughton, and Goodwin. Complainant recovered and the land was sold, leaving a deficiency of fourteen hundred and seventy-three dollars and eighty cents, for which amount complainant asked personal judgment against Witherby, Stoughton, and Goodwin. The agreement for the purchase of the land was not in writing, but the purchasers were placed in possession.

James E. Webb, for the appellant.

Knox, Bowie & Dixon and Browne & Leeper, for the appellees.

⁴²⁶ HARALSON, J. It is manifest that, admitting all that is stated by defendant, J. B. Goodwin, to be true, the averments of the bill as admitted by the other respondents—Witherby, Stoughton, and Carter, in their respective answers, and as shown by them, when examined as witnesses, to be substantially true—may be also true. As corroborative of the truth of the real

transaction as it was, and as it was intended to be, Witherby in his deposition proves and attaches several letters written by Goodwin to Stoughton, and to Witherby and Stoughton. In one, dated March 5, 1890, he says: "I note you have closed the trade with Merrell by paying him twenty-five dollars down, and you are now having deeds and records examined. I would suggest that it would be best to have Merrell to deed property to Carter (I believe that is the name of the old gentleman that did the buying), and he ⁴²⁷ in turn to deed it to us, Carter also giving his notes to Merrell, so that we won't appear in the transaction at all. Have deed from Merrell to Carter recorded at Columbiana, but don't record deed from Carter to us, so that if we don't work deal with our Kansas friend, we will be in a position to work it otherwise, and not appear in transaction, as we could destroy deed from Carter to us, it not being on record, and Carter could then make deed to whomsoever we sold, under which agreement we could work to better advantage."

In another, dated July 21, 1890, to Witherby and Stoughton, he requests them to get Merrell to extend note, "as it is not convenient for me to pay my part now"; and in another, to Witherby, dated October 22, 1890, he says, "Am sorry to say that I am not in a position at present to meet any part of the notes. I think you and the Col. [meaning Stoughton] ought not to object carrying my part for a while, anyway, as I loaned you and him the money to join with; and turn about is fair play."

From all the evidence, it is too plain to admit of serious dispute that this transaction of the purchase of this land was by Witherby and associates on the one side, as purchasers, and Green Merrell on the other, as vendor of the land; that they were the real parties to the transaction from beginning to end; that Carter was simply their agent, and that all he did was for them, on their account, and in their interest. They paid all the purchase money that was paid, and it was well understood and agreed between them and Carter and Merrell that they were to pay the balance. For purposes well intimated in the proofs, Carter was to be held out as the purchaser, while they were to remain in the background for whatever advantages might accrue to them from such a movement. They are bound on every principle of law and equity for the purchase money remaining due on the note sued on. They bought the property, paid a large part of the purchase money, and were put in possession of the land. If their contract of purchase was in parol, under such

proof, it was unaffected by the statute of frauds: *Parrish v. Steadham*, 102 Ala. 615; *McMahan v. Jacoway*, 105 Ala. 585, 587; *Eubank v. May etc. Hardware Co.*, 105 Ala. 629; *A. G. Rhodes Furniture Co. v. Weeden*, ⁴²⁸ 108 Ala. 252, 255. If the essence of the original understanding was to create a debt of their own, founded as it was on a present valuable consideration, as is too plain for dispute, though the effect of the payment thereof is to pay the debt, also, of Carter, the transaction is relieved of the statute of frauds: *Aultman v. Fletcher*, 110 Ala. 452; *Coleman v. Hatcher*, 77 Ala. 217; *Young v. Hawkins*, 74 Ala. 370, 373.

Moreover, the contract was executed. Nothing remained to be done on Witherby and associates' part, nor on the part of Merrell, the vendor, or of Carter, standing in the place of the real purchasers, but for them to pay the balance of the purchase money as they had agreed to do. The statute of frauds has no application to executed, but to executory, contracts: *Lagerfelt v. McKie*, 100 Ala. 430; *Gafford v. Stearns*, 51 Ala. 444.

The statute, Code of 1886, section 3605 (Code 1896, sec. 859), provides for the issuance of executions in all foreclosure suits and suits for the enforcement of equitable liens, of which character is a suit for the enforcement of vendor's lien.

From what has been said, it is manifest that the court erred in sustaining the defense set up by, and in not rendering a personal judgment against, the respondents.

The decree of the court below will be reversed, and this court, proceeding to render the decree that the court below should have rendered, orders that judgment be here entered against each of the defendants, W. R. Carter, Edwin T. Witherby, Homer R. Stoughton, and James B. Goodwin, for the sum of fourteen hundred and seventy-three dollars and eighty cents, with interest from the seventeenth day of May, 1897, the date of the sale of said real estate by the register and his report thereof to the court below.

Reversed and rendered.

PER CURIAM. After a careful examination of the original bill of complaint filed in this cause we have arrived at the conclusion that its averments are insufficient to authorize a personal decree against the defendants, Witherby, Stoughton, and Goodwin. This view, which we now take of the case, was not presented upon the original hearing either by argument or by briefs of counsel ⁴²⁹ which were addressed to other questions

then considered; and it is urged upon us for the first time in support of the application for rehearing.

From the authorities the rule is deducible that, when a sale is made to one who is acting in the purchase as agent for a principal who is known to the vendor, and only the personal obligation of the agent is taken for the price of the property sold, the *prima facie* presumption arises that the personal credit is given to the agent alone: *Gates v. Brower*, 9 N. Y. 205, 59 Am. Dec. 530; *Coleman v. First Nat. Bank of Elmira*, 53 N. Y. 388; *Taintor v. Prendergast*, 3 Hill, 72, 38 Am. Dec. 618; *Tuthill v. Wilson*, 90 N. Y. 423; *Paige v. Stone*, 10 Met. 160, 43 Am. Dec. 420, and note.

The bill here states only enough to bring the case within that rule. It avers that the sale of land was made by Green Merrell, complainant's transferrer, to W. R. Carter, as the agent of Ed T. Witherby, Homer R. Stoughton, and James B. Goodwin, and that the conveyance was made by the vendor to Carter and that Carter's note was taken for the deferred payment.

A theory is advanced in appellant's brief replying to the application for rehearing to effect that he is in equity subrogated to the rights of Carter as against Witherby, Stoughton, and Goodwin to compel them to pay the debt for which Carter had bound himself in their behalf. The bill is not framed to obtain relief in that aspect. If such equity exists, it could be enforced only upon averment of facts showing the nature of the obligation to Carter resting upon his principals. The status of the transaction between them is not shown by the bill otherwise than that Carter acted for his principals in the purchase with the understanding that he, after obtaining title, should convey the land to them, and "that said W. R. Carter executed his deed to said land to the said Ed T. Witherby, Homer R. Stoughton, and James B. Goodwin, but the date of said deed and the consideration therefor are unknown to complainant." It is alleged that Witherby, Stoughton, and Goodwin made the cash payment, but it is not alleged that they made any agreement, express or implied, with Carter or Green Merrell to make those or any remaining payments for the land.

⁴³⁰ The rule is, as stated in *Duckworth v. Duckworth*, 35 Ala. 70, that "the bill should state the title or claim of the complainant with accuracy and clearness, and with such certainty that the defendant may be distinctly informed of the nature of the case which he is called upon to meet. If the facts essential to the right of the complainant are not clearly and

unambiguously alleged, the defect will be fatal; for no facts are properly in issue, unless charged in the bill, and no proof can be made of, or relief granted for, facts not charged."

The petition for the personal decree referred to in appellant's brief does not, in fact, and could not, properly supply the averments necessary to bind the defendants, Witherby, Stoughton, and Goodwin.

The petition for rehearing must be granted, and the decree appealed from will be here affirmed.

STATUTE OF FRAUDS—SALE OF LAND.—Delivery of possession by a vendor to his vendee and a continuation thereof by the latter, together with a payment of a considerable part of the purchase money, take a parol agreement for the sale of land out of the statute of frauds: *Blanchard v. McDougal*, 6 Wis. 167, 70 Am. Dec. 458, and note. But payment of the purchase money alone is insufficient: *Nelson v. Shelby Mfg. etc. Co.*, 96 Ala. 515, 38 Am. St. Rep. 116, and note. See, also, *Washington v. Soria*, 73 Miss. 665, 55 Am. St. Rep. 555.

THE STATUTE OF FRAUDS is not applicable to an executed agreement: *Bates v. Babcock*, 95 Cal. 479, 29 Am. St. Rep. 133.

AN AGREEMENT TO ANSWER FOR THE DEBT OF ANOTHER, when supported by a consideration moving between the newly contracting parties, is not within the statute of frauds: *Tindal v. Touchberry*, 3 Strob. 177, 49 Am. Dec. 637. This principle of the statute of frauds is the subject of a monographic note to *Packer v. Benton*, 95 Am. Dec. 251-263.

AGENCY.—A PERSON TAKING AN AGENT'S NOTE for work performed, with knowledge of the principal's liability therefor, discharges such liability: *Paige v. Stone*, 10 Met. 160, 43 Am. Dec. 420.

EQUITY PLEADING.—The rule that certainty to a common intent must exist in pleadings applies as well in equity as at law, the reason of the rule in both instances being to inform the adverse party with sufficient precision of the charge made against him, and to enable the court to pronounce the proper judgment: *Farr v. Farr*, 34 Miss. 597, 69 Am. Dec. 406.

ELROD v. HAMNER.

[120 ALABAMA, 463.]

DETINUE—LIABILITY OF OFFICER WHO FAILS TO RETURN PROPERTY TO DEFENDANT.—The duty of an officer who has taken property into possession under a writ of detinue to return it to defendant, if he gives the required bond within five days after seizure, or where such bond is not given, upon failure of the plaintiff to give the bond as provided by statute, is imperative, and his failure to do so is an official misfeasance, for the damages resulting from which he and the sureties upon his official bond are liable.

DETINUE—LIABILITY OF OFFICER—DEFENSE OF NO TITLE IN DEFENDANT.—In an action against an officer for his failure to return to the defendant property seized under a writ of detinue, the officer cannot set up as a defense to the action, or in mitigation of damages, that the defendant did not own the property, or that he had only a qualified interest therein.

DETINUE—ACTION AGAINST OFFICER FOR FAILURE TO RETURN PROPERTY—PLEADING.—In an action against an officer for failure to return to the defendant in a detinue suit the property seized, an averment that "the plaintiff tendered a proper forthcoming bond to said constable as provided [by statute]" is a sufficient allegation that the forthcoming bond was for the proper amount, with sufficient surety and conditioned as provided by the statute.

DETINUE—ACTION AGAINST OFFICER—PLEADING.—Where a statute requires an officer to return to the defendant property seized under a writ of detinue if the plaintiff fails to give a forthcoming bond as provided by statute, such defendant, in an action against the officer for failing to return the property, is only required to aver a failure of the plaintiff in the detinue suit to give the proper forthcoming bond, and need not aver that the defendant himself gave a bond to the officer as required by statute.

DETINUE—LIABILITY OF OFFICER—NECESSITY OF DEMAND FOR RETURN OF PROPERTY.—Under a statute requiring that if the plaintiff fails to give a bond within a prescribed time, the property which has been seized by an officer under a writ of detinue must be returned to the defendant, it is not necessary that the defendant should demand of such officer the delivery of the property, in order to render him liable to the defendant for his failure to return it.

Jones & Brown, for the appellants.

Somerville & Verner, for the appellee.

466 TYSON, J. This action was commenced by appellee against appellant, who was a constable, and the sureties upon his official bond.

467 In the first count of the complaint it is alleged that upon the seizure by defendant, under a writ of detinue, of one thousand pounds of lint cotton, "which was at the time in the possession of plaintiff [appellee] and bona fide claimed by him as his property," plaintiff, within five days thereafter, tendered "a proper forthcoming bond to said constable as provided by section 2717 of the code of Alabama, and made demand of said constable to deliver back to plaintiff the said cotton seized and held as aforesaid, and that said constable refused, neglected, and failed to do so."

The second count charges that the plaintiff in the detinue suit, one Holman, having failed to give a forthcoming bond within five days after the time allowed by statute to the defendant for the giving of such bond had expired, the constable

"did fail, neglect, and refuse to deliver back said cotton to the plaintiff in this action."

In an action for the recovery of personal property in specie, if the plaintiff makes the affidavit and bond required by the statute, the officer executing the writ is required to take the property into his possession unless the defendant gives a forthcoming bond: Code 1886, sec. 2717; Code 1896, sec. 1474. If the defendant neglects for five days to give such bond, the property must be delivered to the plaintiff, on his giving a forthcoming bond with sufficient surety. If the plaintiff fail to give such bond for five days after the expiration of the time allowed the defendant, the property must be returned to the defendant: Code 1886, sec. 2718; Code 1896, sec. 1475. If no bond is given by either of the parties within the time prescribed by the statute, the status of the property is the same as if no affidavit and bond had been made in the first instance, and, in the event of a recovery by plaintiff, a writ may issue against the defendant for the seizure and delivery of the property to satisfy the judgment. The duty of an officer who has taken property into possession under a writ of detinue to return it to defendant if he gives the required bond within five days after seizure, or, where such bond is not given, upon failure of plaintiff to give the bond as provided by the statute, is imperative, and his failure to do so is an official misfeasance, for the damages resulting from which he and the sureties upon his official bond ⁴⁶⁸ are liable: *McElhaney v. Gilleland*, 30 Ala. 183; *Gay v. Burgess*, 59 Ala. 575; *Thorn v. Kemp*, 98 Ala. 417; *Burgin v. Raplee*, 100 Ala. 433; *Couch v. Davidson*, 109 Ala. 313. When sued for the breach of such duty, he cannot set up in defense of the action or in mitigation of damages that the defendant in the detinue suit did not own the property, or that he had only a qualified interest therein, or that it was subject to a mortgage. As said in *Gay v. Burgess*, 59 Ala. 575: "The duty imposed by the statute is plain and simple—it is restoration of possession to the defendant. The officer has no option, and it is not his province to inquire, nor has he authority to determine, who is the owner, whether plaintiff or defendant. It would be against the policy of the law to suffer him to escape the consequences of the wrong by setting up the title of the plaintiff in the action of detinue, with which only his wrong connects him. If the defendant shall recover of him the value of the property of which he is not the real owner, he has involved himself in the loss by his disobedience of the statute and a wanton abuse of the authority

of the law." This doctrine is reaffirmed in *Thorn v. Kemp*, 98 Ala. 425.

What has been said above disposes of the first, second, and third grounds of demurrer to the first and second counts interposed by defendant Elrod, which were properly overruled, and also demonstrates that the rulings of the court upon the sufficiency of defendants' pleas, except the sixth, was correct. The demurrer to the first count on the ground that "it fails to show that plaintiff tendered to the constable a bond with sufficient surety in double the value of the property, payable to the plaintiff, T. L. Holman, with condition that if the defendant was cast in the suit he would, within thirty days thereafter, deliver the property to the plaintiff, T. L. Holman, and pay all costs and damages which may accrue for the detention thereof," is substantially in the words of the statute requiring defendant to tender a sufficient bond before he is entitled to have the property delivered to him. The breach of duty complained of in this count cannot exist unless there is a tender of a bond of proper amount, sufficient surety, and conditioned as provided by the statute. Hence the complaint must aver facts from ~~469~~ which the inference necessarily follows that a bond such as the statute prescribes was tendered. The averment is, "the plaintiff tendered a proper forthcoming bond to said constable as provided by section 2717 of the code of Alabama." We think that the only reasonable inference to be drawn from this language is that defendant not only tendered a forthcoming bond, but it was for the proper amount, sufficient surety, and conditioned as provided by the statute. The demurrer was, therefore, rightly overruled.

The demurrer to the second count on the ground that it failed to aver that defendant in the detinue suit "executed, tendered, or delivered to said constable a bond, as required and authorized by section 2717 of the code," is without merit, since, to fix the liability of, and show a cause of action against, the defendant, it was only necessary to aver a failure of the plaintiff in the detinue suit to give a forthcoming bond within the time fixed by the statute; failing in this, it was the duty of the constable to return the property to the defendant in said suit. The other grounds of demurrer to this count of the complainant are equally as untenable, and there was no error in overruling them.

This brings us to a consideration of the sufficiency of the sixth plea to the second count, which invokes the defense that

it was necessary after the expiration of the ten days from date of seizure for defendant in the detinue suit to demand of the constable the delivery of the property. In order to sustain it, we will be impelled to interpolate into the statute the words "after demand." The clause of the statute as written is, "if the plaintiff fail to give such bond for five days after the expiration of the time allowed the defendant, the property must be returned to the defendant." There is no ambiguity in the language. The officer must retain possession for ten days after seizure unless a bond is given by one of the parties to the suit, and at the expiration of the ten days the statute commands him to return it to defendant, and a retention by him after that time was without authority, illegal, and a violation of his duty to the defendant. The demurrer was properly sustained: *Hall v. Perryman*, 42 Ala. 122.

⁴⁷⁰ We do not deem it necessary to further consider the pleading in the cause, since there is no evidence in the record to sustain those parts of pleas 1 and 2 remaining after the motion to strike was granted by the court below, and the replication and rejoinder thereto.

The only remaining question to be determined is whether the evidence made out the plaintiff's case under either count of the complaint. The proof shows that on the fifth day after the seizure of the cotton the plaintiff in the detinue suit gave a forthcoming bond signed by himself alone without any sureties, and that after the expiration of ten days from the date of the seizure the bond was signed by two sureties. This was not a compliance with the statute, and did not authorize the constable to deliver the property to the plaintiff. The evidence is without dispute, therefore, that a forthcoming bond was not given within such time as to deprive the plaintiff in this action of his right to have the cotton returned to him.

The judgment of the circuit court is affirmed.

REPLEVIN MAY BE MAINTAINED AGAINST A SHERIFF after it has become his duty to deliver the property taken by him under a writ of replevin to one of the parties in that suit: *Welter v. Jacobson*, 7 N. Dak. 32, 66 Am. St. Rep. 632, and note. As to when demand before suit is necessary, see *Hopkins v. Bishop*, 91 Mich. 323, 30 Am. St. Rep. 480, and note.

WESTERN ASSURANCE COMPANY v. HALL.

(120 ALABAMA, 547.)

INSURANCE—ARBITRATION—RIGHT TO SUE.—While a provision for arbitration in an insurance policy is binding, it is collateral to the contract for insurance, and if it fails of accomplishment without fault of the parties, they are relegated to their legal rights independent thereof.

INSURANCE—WHEN NOT REQUIRED TO ARBITRATE.—After disagreement as to loss and a request by either party for arbitration, both parties are under a duty to act in good faith to have the loss ascertained as provided by the policy; and if either in bad faith prevents such ascertainment by refusing to proceed, or by insisting on the selection of improper arbitrators, or by undue interference with them after their selection, the other party is thereby absolved from further obligation to arbitrate.

INSURANCE—FAILURE TO ARBITRATE—EFFECT OF.—If the failure to arbitrate is due to the fault of the insured, it is a defense to an action on the policy, but, if due to the fault of the insurer, the lack of an award is not available to defeat a recovery.

INSURANCE—ARBITRATION—WHO MAY BE ARBITRATORS.—Where, in case of disagreement as to loss, an insurance policy provides that the loss may be appraised by arbitrators, the parties are not bound to submit to an appraisement by interested or otherwise incompetent parties.

INSURANCE—EVIDENCE OF LOSS WHERE NO AWARD BY ARBITRATORS.—In an action on a fire insurance policy, evidence as to loss is properly admitted, where there has been no award by arbitrators in accordance with the terms of the policy.

INSURANCE—REFUSAL TO ARBITRATE—WHAT NOT SUFFICIENT EXCUSE FOR.—A refusal to allow arbitrators to proceed, merely alleging that the umpire and the appraiser appointed by the insurer are interested parties and employed by the insurer, without any proof of interest, partiality, or other incompetence, is not a sufficient excuse for a failure to arbitrate as required by the policy.

INSURANCE—WHAT IS NOT WAIVER OF ARBITRATION.—Neither the failure to admit liability nor the demand for arbitration is equivalent to denial of liability which amounts to a waiver of arbitration, for the reason that in case of such denial the dispute is not about the amount of loss.

PLEADING—STRIKING OUT SURREJOINDER.—A surrejoinder which is but a repetition of a previous replication should be stricken out on motion.

Alexander T. London, John London and R. W. Walker, for the appellant.

Lawrence Cooper, for the appellees.

553 **SHARPE, J.** This is an action upon a fire insurance policy issued by appellant to the appellee, and is in this court upon a second appeal. The main controversy arises out of the clause therein providing for arbitration of differences as to loss.

After remandment of the cause, there remained in the record besides the general issue, ⁵⁵⁴ which is numbered 1, the special pleas numbered respectively 2, 3, 4, and 5, the sixth having been withdrawn.

Plea No. 2 sets out the clause in question, and avers in substance that differences arose as to the loss, that defendant requested that an appraisement be had as provided by the policy, and that plaintiffs refused to have the loss so ascertained, wherefore the action was not maintainable.

Plea No. 3 avers a further stipulation in the policy to the effect that the loss should not be payable until sixty days after its ascertainment by such appraisement, and that, though the appraisement was required by defendant, no award as to the loss had been made or furnished to defendant.

Plea No. 4 avers a further provision of the policy to effect that no suit thereon should be maintainable until after compliance with such provision for appraisement, and that plaintiffs refused, after demand, to have the loss so ascertained.

Plea No. 5 sets up substantially that after appraisers had been selected and had begun to act, plaintiffs induced the one selected by them to refuse to act, and refused inspection of the damaged property to the other appraiser and the umpire, so disabling them to appraise the loss.

The demurrers were again interposed to these pleas and overruled. Plaintiffs replied generally, and filed ten replications to each of the special pleas, designating them by letters from a to j consecutively, and demurrers were sustained to all excepting e, g, h, i, and j, as to each of which demurrers were overruled. Rejoinders, general and special, were filed, upon which the plaintiffs surrejoined. The sufficiency of the pleas is not a question before us, the assignments of error being upon the rulings upon demurrers to replications and upon subsequent proceedings. The replications to which the assignments of error relate each set up, in avoidance of the pleas, fault and misconduct on the part of appellant respecting the matter of arbitration. As the application of the proof to the general issues formed thereon must determine the result of this appeal, it is well to notice them ⁵⁵⁵ particularly. Replication e, after setting out the stipulation in question, avers that the "said defendant wholly failed and refused to comply with its obligation contained in said stipulation in said policy." Replication g avers that upon appellee's demand for such arbitration "said defendant failed and refused to select a competent and disinter-

ested appraiser as by said policy provided." The substance of replications h and i is the selection by appellant of a partial and interested appraiser to act in the arbitration; and replication j sets up an attempted arbitration wherein appellant selected an interested appraiser, which fact of interest was unknown to plaintiffs, and a refusal to act with him on the part of the appraiser selected by appellee after learning of such interest.

By the opinion rendered upon the former appeal to which we now adhere, the stipulation in question was held valid and binding upon the parties: *Western Assur. Co. v. Hall*, 112 Ala. 318. The provision for arbitration is collateral to the contract for insurance; and if it fails of accomplishment without fault of parties, they are relegated to their legal rights independent thereof: *Pretzfelder v. Merchants' Ins. Co.*, 116 N. C. 491; *Braddy v. New York etc. Ins. Co.*, 115 N. C. 354; *Insurance Co. v. Hocking*, 115 Pa. St. 416. After disagreement as to the loss and a request by either party for arbitration, both parties were under the duty to act in good faith to have the loss ascertained as provided by the policy; and if either in bad faith prevented such ascertainment by refusing to proceed, or by insisting on the selection of improper arbitrators, or by undue interference with them after their selection, the other party is thereby absolved from further obligation to arbitrate: *Caledonian Ins. Co. v. Traub*, 83 Md. 524; *Uhrig v. Williamsburg City Fire Ins. Co.*, 101 N. Y. 362; *Aetna Fire Ins. Co. v. Stevens*, 48 Ill. 31; *Joyce on Insurance*, sec. 3252; *May on Insurance*, 496 D; *Biddle on Insurance*, sec. 1172. If such fault be attributable to the insured, it is a defense to the action on the policy, but if to the insurer, the lack of an award is not available to defeat a recovery. Tested by these principles the replications in question were each sufficient, and the demurrers thereto were properly overruled.

⁵⁵⁰ Appellees' rights could not be defeated by the act of appellant in wholly refusing to comply with the obligation as averred in replication e; nor is that averment open to the objection of generality, since the fact of wholly refusing is issuable and is the vital part of the averment.

By the terms of the policy, appellees were not bound to submit to an appraisement by interested or otherwise incompetent persons, since they do not fulfill the requirements of the policy: *Biddle on Insurance*, sec. 1172; *Joyce on Insurance*, sec. 3242; *Aetna Fire Ins. Co. v. Stevens*, 48 Ill. 31.

On the trial, it was shown by the proof that the fire occurred

on January 31, 1894, resulting in damage to part and the total loss of another part of the property insured. Plaintiffs and Adams, the company's adjuster, disagreed as to the loss, and on February 21, 1894, entered into an agreement whereby La Coste was selected by appellant and White was selected by appellees to ascertain the loss as provided by the policy. These appraisers selected Myers as umpire, and proceeded on the next day to examine the property and estimate the damage. After working an hour or two they disagreed, and White thereafter refused to act further. On the following day, La Coste and Myers came to the factory containing the property and demanded admittance, which was refused by the plaintiffs. Plaintiffs notified Adams of White's refusal to act, and the correspondence appearing in the record was had, and from that it appears that on March 16th Adams demanded of plaintiffs that they have White meet La Coste and Myers on the next day to proceed with the appraisal, to which plaintiffs replied on the same day to the effect that White refused to act with La Coste and Myers, and that they were unable to coerce his presence, and also objecting to La Coste and Myers serving as appraisers, on the ground that their views were known, and that La Coste was not disinterested, and that he and Myers had been employed and paid by the insurance company, and proposing to submit the matter "to any two gentlemen of the country who have no interest in the case." On April 22, 1894, Adams wrote plaintiffs demanding that the appraisers and umpire, or any two of them, be allowed admittance ⁵⁵⁷ to the factory and to make the award. To this plaintiffs replied on May 3, 1894, by letter, stating again White's refusal, and objecting to La Coste and Myers proceeding alone, professing willingness to arbitrate under the terms of the policy, and proposing the selection of new arbitrators and expressing belief that the company would not object to "our proposition to select any two reputable citizens of Huntsville or Madison county."

The loss under the policy was five hundred and sixty-six dollars and eighty cents. There having been no award, the evidence as to loss was properly admitted under the issues tried.

Ordinarily, the question of the breach of the arbitration clause is for the jury. The evidence here, however, is without conflict, and the question of its effect is raised by the assignments of error upon the giving of the general affirmative charge for the plaintiffs, and refusal of a similar charge asked by defendant. Such effect must be judged of in view of the issues formed by the pleadings.

It will be noticed that the third plea stops short of averring any act or conduct on the part of appellee operating to prevent the arbitration; merely averring in that respect that no award had been received by or furnished to appellant. Under a familiar rule, the defendant succeeds if any plea interposed to the whole complaint is established by the proof, unless matter be replied and proven in avoidance. While such matter is here replied to plea 3, the replications are unsupported by proof. It appears therefrom as an undisputed fact that appellant did not wholly refuse to arbitrate, but, on the contrary, that by agreement of both parties an arbitration was actually entered upon and continued until White refused to act further. Neither is there any proof of interest, partiality, or other incompetency on the part of La Coste. Mere recitals contained in letters written by the appellees are not proof of such facts. In such state of the pleading and proof the appellant was entitled to a verdict, and there was error in refusing the charge so affirming asked by appellant, as well as in giving the opposite charge for the plaintiffs. Charges 2 and 3 given at request of appellees were likewise erroneous in the principles asserted. Neither the failure to admit liability nor the demand for arbitration is equivalent to a ⁵⁵⁸ denial of liability which, as is generally held, amounts to a waiver of arbitration, for the reason that in case of such denial the dispute is not about the amount of loss: *Biddle on Insurance*, sec. 1175; *May on Insurance*, 496; *Bailey v. Aetna Ins. Co.*, 77 Wis. 336; *Phoenix Ins. Co. v. Badger*, 53 Wis. 283.

Surrejoinder b was but a repetition of what had been averred in replication g, and the motion to strike it out should have been granted: *Hightower v. Ogletree*, 114 Ala. 94.

For the errors mentioned the cause must be reversed and remanded. If upon another trial the parties see proper to employ the same prolixity of pleading that appears in this record, it will be well for them to note that the statement attempting to assign generally the several surrejoinders to rejoinders is so vague that no effect can be accorded to it. Also, that the several statements assigning replications to pleas by general reference thereto, is uncertain in that it mentions the "replication" to plea 2 in the singular, whereas there are ten replications to plea 2.

We have treated the case as if the replications remaining after demurrer were assigned separately to the pleas separately, for the reason that they appear to have been so treated by the

parties in the circuit court and in this court; but the result of the appeal is not affected by such construction.

Reversed and remanded.

INSURANCE, FIRE—ARBITRATION.—A mere provision in a policy of insurance for arbitration in case of disagreement as to the amount of loss is an independent agreement, collateral to the main purposes of the policy. A breach of such provision cannot be pleaded in bar to an action on the policy, though it may support a separate action: *Read v. State Ins. Co.*, 103 Iowa, 307, 64 Am. St. Rep. 180; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 62 Am. St. Rep. 47. Where failure to arbitrate is chargeable to the insured, it is no defense to an action on the policy: *Savage v. Phoenix Ins. Co.*, 12 Mont. 458, 33 Am. St. Rep. 591; *Hennessy v. Niagara Ins. Co.*, 8 Wash. 91, 40 Am. St. Rep. 892; and this is true even though an offer to arbitrate is made after the insured brings suit: *Stephens v. Union Assur. Soc.*, 16 Utah. 22, 67 Am. St. Rep. 595. An action can be maintained when, through the instrumentality or bad faith of the insurer, the arbitrators reach no agreement, or when an appraiser chosen by the insurer prevents the appointment of a disinterested umpire: *Niagara Ins. Co. v. Bishop*, 154 Ill. 9, 45 Am. St. Rep. 105. Where a party, whose duty it is to appoint an arbitrator, fails to replace him on his failure to act promptly, the other party cannot be made to suffer through such party's inaction: *Read v. State Ins. Co.*, 103 Iowa, 307, 64 Am. St. Rep. 180. A condition providing for arbitration cannot operate to deprive the assured of his right of action, unless clearly made a condition precedent to the existence of such right: *Grand Rapids Ins. Co. v. Finn*, 60 Ohio St. 518, 71 Am. St. Rep. 736, and note.

PULLMAN PALACE CAR COMPANY v. ADAMS.

[120 ALABAMA, 581.]

SLEEPING-CAR COMPANIES are not held to the responsibility of common carriers and innkeepers.

SLEEPING-CAR COMPANIES—LIABILITY FOR THEFT.—A sleeping-car company is under a duty to use reasonable care to guard its passengers from theft, and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable.

SLEEPING-CAR COMPANIES—DUTY GENERALLY.—A sleeping-car company is bound to furnish a passenger with a berth for his accommodation, and to keep watch and take reasonable care that he suffers no loss.

SLEEPING-CAR COMPANIES—LIABILITY FOR LOSS OF PASSENGER'S PERSONAL EFFECTS.—The liability of a sleeping-car company for the loss of a passenger's personal effects does not include anything except the clothing, ornaments, and such articles as are usually carried by travelers in their hands, together with a sum of money reasonably sufficient for the expenses of the journey in which one is engaged.

SLEEPING-CAR COMPANIES—CARE IN THE NIGHT-TIME.—The care required of a sleeping-car company to secure the

safety of its passengers in the night-time necessitates that the watching should be continuous and active.

SLEEPING-CAR COMPANIES—NEGLIGENCE OF ONE'S SLEEPING COMPANION.—Where a passenger's property has been stolen through the negligence of the sleeping-car company, the fact that his traveling companion, who occupied the berth with him, was negligent in reference to the property does not relieve the company from liability.

SLEEPING-CAR COMPANIES—PROTECTION OF PROPERTY IN A BERTH.—The law draws no distinction as to places of safety in the berth of a sleeping-car, and property placed anywhere in a berth is entitled to protection.

SLEEPING-CAR COMPANIES—LIABILITY FOR LOSS OF VALUABLE RING.—A sleeping-car company is not liable for the theft of a diamond ring from the purse of a sleeping passenger, where, because of a loose setting, the ring was not in a condition to be worn for the use, convenience, or ornament of the passenger.

SLEEPING-CAR COMPANIES—LIABILITY FOR LOSS OF RING.—Where a passenger takes off at night a ring which he is accustomed to wear, and puts it in a pocket-book, which book is stolen from his berth, this is not such contributory negligence as to preclude a recovery against the company.

CONTRIBUTORY NEGLIGENCE.—THE BURDEN OF PROOF as to contributory negligence is in all cases on the defendant, unless the plaintiff's own evidence establishes it.

TRIAL—PREPONDERANCE OF EVIDENCE.—AN INSTRUCTION that the jury must find according to the preponderance of the evidence is erroneous, since mere preponderance may not convince the minds of the jury, and, to justify a verdict, the measure of proof must reasonably satisfy the minds of the jury that the fact exists.

Action against Pullman Palace Car Company to recover one hundred and fifty dollars damages for the loss of a pocket-book containing twenty-five dollars in money and a diamond ring valued at one hundred and twenty-five dollars. Counts 2 and 3 of the complaint allege that plaintiff occupied a berth in one of defendant's cars, and, on retiring at night, left in his vest pocket a pocket-book containing twenty-five dollars in money and a diamond ring valued at one hundred and twenty-five dollars, placing his vest in the hammock in the rear of his berth; that in the morning plaintiff found the contents of the pocket-book stolen, which loss he made known to the conductor, all of which occurred by reason of defendant's negligently failing to provide suitable employes to protect the plaintiff's property. Defendant filed four pleas: 1. Of the general issue; 2. That plaintiff was negligent in placing his pocket-book in the hammock, instead of placing it under his pillow or keeping it near or on his person; 3. Plaintiff was negligent in not properly taking care of his pocket-book and contents; 4. Plaintiff was guilty of

negligence in placing his pocket-book and contents in a hammock two feet from him and in reach of others, that the hammock was an unsafe place, and plaintiff should have placed his pocket-book under his pillow or nearer his person. Among defendant's instructions which were refused were: 4. That plaintiff could not recover if the hammock was not the safest place to put his vest, and if the loss occurred by reason of his not putting vest in safest place; 19, 21, 34, and 35, to the effect that the defendant would not be liable for the loss of the diamond ring if it was not in a condition to be worn for the use, convenience, or ornament of the plaintiff on the trip. Plaintiff's charge 28 given to the jury was: "It is the duty of a sleeping-car company to exercise reasonable diligence in looking after the person and property of passengers on its car while they are asleep."

J. M. Falkner, George W. Jones, and Ray Rushton, for the appellant.

Browne & Leeper, for the appellee.

⁵⁹² HARALSON, J. There was no error in overruling the demurrers to the second and third counts of the complaint. They sufficiently advised defendant of what the plaintiff complained, and against which he was called to defend. Nor was there error in sustaining the demurrers to defendant's second and third pleas of contributory negligence. The cause was tried on issue joined on the plea of the general issue, and on the fourth plea, to which a demurrer was overruled.

In this case the appellee, plaintiff below, with his friend, Alcorn, left Longview on the afternoon of February 20, 1895, to go on a journey to New Orleans. On reaching Montgomery, he and his friend went into a sleeper of the defendant company and paid two dollars for an upper berth, for himself and Alcorn. About 9 o'clock, the two retired, Alcorn taking the back and plaintiff the front side of the berth. The plaintiff testified that he placed his pocket-book, which was a large one, on the inside of his vest pocket, and placed the vest in a hammock that was swinging just above, on the back side of the berth, and went to sleep shortly after retiring; that he did not awake until the train was in about an hour's run of New Orleans, and it was then daylight; that Alcorn was up and dressed and waked him up; that his vest was lying on the outer edge of the berth on the top of the cover; that his watch was in the vest as he left it, but the pocket-book was gone; that it contained,

amongst other things, twenty-five dollars in money and a diamond ring, worth one hundred and twenty-five dollars, and the property has never been recovered. He testified, on cross-examination, that the setting of the ring had been loose for some time; that he had worn it ⁵⁹³ until two or three weeks before going to New Orleans, and the stone being loose, on the advice of a jeweler that it was unsafe to wear it, he had carried it for that length of time in his pocket-book, with the intention of having the diamond set in a plain gold band.

Alcorn testified for plaintiff that, prior to starting out on their journey, the plaintiff had shown him two certificates of deposit on a bank amounting to five thousand dollars, and something wrapped up in a paper, which he said was his diamond ring, and the setting was loose, was the reason he had wrapped it up; that he occupied the berth with plaintiff, slept on the back side of the berth and placed his coat in the hammock first; that plaintiff, when he got in the berth, placed his vest in the hammock on witness' coat; that he could not sleep and got up about midnight, took hold of his coat with his right hand and with his left held plaintiff's vest while he drew out his own coat from the hammock, and crawled out over plaintiff, who he thought was asleep; that he saw the porter sitting on something asleep, but did not see the conductor till the train whistled to stop at Mobile, and from the time he got out of the berth until they got to Mobile, he walked back and forth through the car, as there was no seat for him to take, and saw no one awake; that if the porter was awake, he had his eyes closed; that at Mobile he got out of the sleeper and went into the day coach, where he remained until about sun-up, when he returned to the sleeper, and, finding plaintiff asleep, he aroused him; saw nothing on the floor, nor did he see the plaintiff's vest, but it was yet quite dark in the sleeper; that as soon as plaintiff got up, he came forward to the washroom, where witness had gone, and stated that his vest had been rifled and his pocket-book emptied of its contents; that the loss was reported to the conductor, who caused search to be made in every nook and corner without avail.

The conductor for defendant testified that, as soon as the porter had made up the berths, he went on watch and remained until 3 o'clock in the morning, and did not leave the car at all, and sat and remained in such position that he could see down the aisle the whole length of the car; that during his watch no one went ⁵⁹⁴ about plaintiff's berth or disturbed any-

thing in it, and no one entered the car that did not belong there; that about 3 o'clock he called the porter, who was sleeping in the smoking-room, and, as soon as the porter came and went on watch, he went to bed and slept till morning; that he retired about forty minutes before the train reached Mobile.

The porter swore that he was making up the berths and the like till all the passengers retired, and the conductor came in and went on watch, and he then went off and went to sleep, till 3 o'clock in the morning, when the conductor woke him up about thirty or forty minutes before reaching Mobile, and, as soon as he went on in, the conductor retired from watch; that he sat at the end of the car, in a position to see down the aisle from one end to the other, and was engaged in blacking the boots of the passengers; that he was continually in that position the remainder of the night, with the exception of the time when the train stopped at Mobile, when, according to the rules, he went to the end of the car to receive passengers, and did not lock the other end of the car, the rule being that the porter of the front car was to lock his front door, and that each was to guard the rear end of his car and the front end of the next car, while the train was stopped; that the porter of the front car was in his place, and witness did not know or remember anything about Alcorn getting up out of his berth and going to the day coach.

The rule now seems to be well settled that sleeping-car companies are not held to the responsibility of common carriers and innkeepers. Many reasons for this distinction will be found stated in the text-books and decisions, and nowhere more fully, perhaps, than in *Blum v. Southern Pullman Palace Car Co.*, 1 Flipp. 500. See, also, *Hutchinson on Carriers*, 617 d; 22 Am. & Eng. Ency. of Law, 797, where the authorities may be found collated.

In *Lewis v. New York etc. Car Co.*, 143 Mass. 267, 58 Am. Rep. 135, the rule as to the liability of such companies, as stated by Morton, C. J., seems to have been generally approved on principle and authority. It is there said: "A sleeping-car company holds itself out to the world as furnishing ⁵⁹⁵ safe and comfortable cars, and, when it sells a ticket, it impliedly stipulates to do so. It invites passengers to pay for, and make use of, its cars for sleeping, all parties knowing that, during the greater part of the night, the passenger will be asleep, powerless to protect himself or to guard his property. He cannot, like the guest of an inn, by locking the door, guard against danger.

He has no right to take any such steps to protect himself in a sleeping-car, but, by the necessity of the case, is dependent upon the owners and officers of the car to guard him and the property he has with him from danger from thieves or otherwise.

"The law raises the duty on the part of the car company to afford him protection. While it is not liable as a common carrier or as an innkeeper, yet it is its duty to use reasonable care to guard the passengers from theft, and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it. Such a rule is required by public policy, and by the true interests of both the passenger and the car company, and the decided weight of authority supports it."

In *Blum v. Southern Pac. Co.*, 1 Flipp. 500, Brown, J., in his instructions to the jury, after a careful statement of the liability of such a company, concludes: "The substance of the law, then, is this: the defendant was not only bound to furnish the plaintiff with a berth for his accommodation, but to keep watch and take reasonable care that he suffered no loss. If plaintiff's loss was occasioned by the want of such care, and his own negligence did not contribute to it, he is entitled to recover such sum as you may deem reasonably necessary for his personal expenses, considering the length of the journey, and all other circumstances of the case": *Woodruff etc. Coach Co. v. Diehl*, 84 Ind. 474, 43 Am. Rep. 102; *Illinois Cent. R. R. Co. v. Handy*, 63 Miss. 609, 56 Am. Rep. 846; *Carpenter v. New York etc. R. R. Co.*, 124 N. Y. 53, 21 Am. St. Rep. 644. The liability of the company in such cases, it has also been held, entirely consonant with reason, does not include anything except the clothing, ornaments, and such articles as are usually carried by travelers in their hands, together with a sum of money reasonably sufficient for the expenses of the journey in which one is engaged. The ground upon which the ⁵⁹⁶ principle rests, so well stated by the Mississippi court in Handy's case cited above, where the traveler had with him a sum of money he was carrying to New Orleans to pay debts with, is, that "it was a much greater sum than was necessary for the payment of expenses incident to the journey he was upon, and as to all in excess of such sum there was no liability of the company, for the reason that as to such an amount it stood in no contract relation to him, owed and undertook no duty, nor authorized its servants to do anything in reference to it." The Ohio court, in a well-considered case holds that a railroad company, even

as a common carrier of passengers, is not liable for the loss of money kept in the sole custody of a passenger, and which he carries without notice to the company, for purposes disconnected with the expenses of the journey, notwithstanding such loss was occasioned by the negligence of the defendant's servants: *First Nat. Bank of Greenfield v. Marietta etc. R. R. Co.*, 20 Ohio St. 259, 5 Am. Rep. 655. The same principle would apply, as stated in the cases last cited, in arguendo, as to small parcels of great value. On no good principle could a traveler be allowed to carry in his pocket jewels and ornaments, wholly disconnected with his personal attire and the necessary and reasonable expenses of his journey, and hold a sleeping-car company liable for them in case of loss. Such a liability would be entirely foreign to the ordinary undertaking of the company in its engagement to furnish the traveler protection, and reasonable accommodations on his journey.

From the foregoing, we may pass on the assignments of error insisted on. There was no error in refusing the general charge for the defendant, as from all the evidence the jury were authorized to draw an inference unfavorable to defendant. The plaintiff's evidence tended to show that the porter went to sleep while on his watch, and that of defendant that he did not sleep. Besides, the porter testified that he left the car at Mobile and went outside to receive passengers, and during his absence it is not shown that anyone was on watch inside the car. This furnished occasion when the theft may have been committed by some of the passengers, of whom there were many. The watching to secure safety of the ⁵⁹⁷ passengers in the night-time should be continuous and active: *Pullman Palace Car Co. v. Gardner* (Penn., Nov. 12, 1883), 16 Am. & Eng. R. R. Cas. 324.

There was no error in refusing charge 4 for defendant. This charge was not within the plea numbered 4 on which plaintiff, by the ruling of the court, was forced to take issue. It may be difficult for a passenger to tell where is the safest place in his berth to place his valuables, to keep them from being stolen. The plea under which the charge was requested does not postulate that it was plaintiff's duty to put his purse in the safest place, nor could any such duty be properly required of him.

Charges 6, 23, and 24 were properly refused. They each contain the instruction for a verdict for defendant, if the loss of plaintiff's property was the result of the negligence of Alcorn, a third person, who happened to be traveling with and shared

the berth of plaintiff. From the evidence, we fail to see in what Alcorn was negligent, and, if he was, the plaintiff, certainly, would not be responsible for it.

Charge 9 was an improper instruction. The porter may not have gone to sleep after the train left Mobile, and it would not follow he may not have been guilty of other negligence, which the charge does not hypothesize.

Though Alcorn may have been awake until the train reached Mobile, there is no evidence that he was on watch, or ought to have been, to protect plaintiff's property. Nor does it follow, because he walked the aisle until he reached Mobile, that plaintiff's purse could not have been stolen. In walking, his back was turned from plaintiff's berth as much as it was toward it. Charge 17 was properly refused.

If there was no evidence of negligence of defendant shown, occurring after the train left Mobile, it would not follow that there had not been negligence of defendant, and that the property had not been stolen, before it reached that point. The eighteenth charge ignores evidence tending to show negligence of defendant at Mobile, and before reaching that point, on account of which the theft may have occurred, and was properly refused.

Charge 25 is abstract. There is no evidence that Alcorn handled the vest, as the charge hypothesizes, in ⁵⁹⁸ such a manner as to allow the pocket-book to fall on the floor. Alcorn testified that he took his coat out of the hammock and left plaintiff's vest, which contained the purse, in the hammock. Plaintiff testified that when he awoke his vest was lying on the outer edge on the cover, and this was all the evidence there was as to the position of the vest after the theft. If Alcorn's evidence is true—and there is nothing to the contrary—the pocket-book, as for anything he did, could not have fallen out on the floor.

Charge 27 seems to require that plaintiff should have placed his vest in the safest place in his berth, and certainly distinguishes between places of safety in the berth, assuming that by depositing it in the hammock it caused the pocket-book to be liable to fall to the floor or to some other more dangerous and exposed place by the act of Alcorn, of which there is no proof, and makes the negligence of Alcorn the negligence of plaintiff. If a charge as to such negligence could be considered at all, it should have postulated the loss as wholly attributable to Alcorn's negligence, and not to a mere liability of loss arising

from his acts. Moreover, for the purposes of another trial, as the cause must be reversed, it is well to add that the demurrer to the fourth plea was, in our judgment, improperly overruled, and that plaintiff was entitled to the exercise of proper, reasonable care on the part of the company to prevent the theft of his pocket-book, placed anywhere in his berth. The law draws no distinction as to places of safety in the berth, and, as for this, the hammock must be regarded as safe as any other place therein for the deposit of the valuables of the passenger while asleep.

Charge 33, without reference to any other fault, bases the instruction on the postulate that plaintiff was guilty of contributory negligence alone on the ground of his having placed his purse in a dangerous place, when he could have placed it in a safer one, and does not hypothesize that the pocket-book was lost on account of such contributory negligence. We may add, however, as we have said in another connection, it was entitled to protection anywhere in the berth.

⁵⁹⁹ From what has been said, it will appear that defendant's charges, 19, 21, 34, and 35 should have been given. Charge 26 was an improper instruction, in its last branch, in which it is said, "If they [the jury] find from the evidence that the ring could be worn in the usual manner, the defendant [plaintiff] was guilty of contributory negligence in not keeping it on his finger, and there can be no recovery for its loss." The proposition asserted is, if one wears a ring, on a sleeper, which he had been accustomed to wearing on his finger, and should take it off at night, and put it in his pocket-book, and the book containing the ring should be stolen from his berth, that this would be contributory negligence on his part, disentitling him to recover, although the theft occurred from the negligence of the defendant—a proposition finding no support in law or reason.

Charge 28 requested by plaintiff asserts, generally, a correct principle of law. If the defendant apprehended that it was misleading in that it did not limit the duty of the company in the care to be taken by it of such property, as, under the rules stated, a passenger may properly carry with him on a sleeper, an explanatory charge should have been requested by it.

It is well settled that the burden of proof as to contributory negligence is in all cases on the defendant, unless the plaintiff's own evidence established it: *Birmingham etc. R. R. Co. v. Wilmer*, 97 Ala. 166; *Montgomery etc. R. R. Co. v. Chambers*, 79

Ala. 338; Kansas City etc. R. R. Co. v. Crocker, 95 Ala. 428; McDonald v. Montgomery Street Ry. Co., 110 Ala. 161, 175, 176. And, in civil cases, as we have heretofore held, when the evidence is equally balanced, the verdict of the jury must be against the party on whom rests the burden of proof; but a charge asserting that the jury must find according to the preponderance of the evidence is erroneous, for the reason that preponderance may not convince the minds of the jury. The measure or weight of proof, to justify a verdict based upon it as to any material fact is, that it shall reasonably convince or satisfy the minds of the jury that the fact exists: Vandeventer etc. Co. v. Ford, 60 Ala. 610; Life Assn. v. Neville, 72 Ala. 600 517; Rowe v. Baber, 93 Ala. 422; Glover v. Gentry, 104 Ala. 222.

For the errors indicated, let the judgment be reversed and the cause remanded.

SLEEPING-CAR COMPANIES are not subject to the liability of common carriers or of innkeepers: Pullman Palace Car Co. v. Gavin, 93 Tenn. 53, 42 Am. St. Rep. 902; note to Pullman Palace Car Co. v. Lowe, 26 Am. St. Rep. 332.

SLEEPING-CAR COMPANIES—LIABILITY FOR PASSENGERS' EFFECTS.—Sleeping-car corporations owe to their customers the duty of maintaining a careful and continuous watch over the interior of the car while the berths are occupied by sleepers, and are liable if property of a passenger is stolen in consequence of the failure to maintain such watch: Pullman Palace Car Co. v. Gavin, 93 Tenn. 53, 42 Am. St. Rep. 902; Carpenter v. New York etc. R. R. Co., 124 N. Y. 53, 21 Am. St. Rep. 644. But this liability is limited to the loss of such articles as are usually carried by a passenger, and to such sum of money as may be deemed reasonably necessary for traveling expenses: Note to Pullman Palace Car Co. v. Pollock, 5 Am. St. Rep. 36. For a general discussion of this subject consult the monographic notes to Illinois Cent. R. R. Co. v. Handy, 56 Am. Rep. 850-852; Pullman Palace Car Co. v. Lowe, 26 Am. St. Rep. 331-340.

CONTRIBUTORY NEGLIGENCE.—THE BURDEN OF PROVING contributory negligence is in all cases upon the defendant, although the plaintiff's evidence sometimes relieves from the necessity of discharging it: Georgia Pac. Ry. Co. v. Davis, 92 Ala. 300, 25 Am. St. Rep. 47; Alabama etc. R. R. Co. v. Frazier, 93 Ala. 45, 30 Am. St. Rep. 28. Compare Bartram v. Sharon, 71 Conn. 686, 71 Am. St. Rep. 225.

LOCKARD v. STEPHENSON.

[120 ALABAMA, 641.]

WILLS—WHO MAY NOT CONTEST.—UNDER A STATUTE providing that a will may be contested by “any person interested therein,” these words refer to and include only such persons as took an interest in the estate under and by virtue of the provisions of the will.

ESTATES.—A LEGAL ESTATE IN EXPECTANCY is a present vested right contingent only as to possible future enjoyment.

ESTATE—WHAT IS NOT.—A MERE EXPECTATION that a wife will make a will in her husband's favor, or will neither give nor grant the estate in her lifetime, and thereby a portion of all will descend to him, is without substance as a present right and incapable of estimate as to future value.

WILLS — WHO MAY CONTEST.—THE CREDITOR of an heir is not a party interested in a will within the meaning of a statute which gives the right to contest a will to “any person interested therein.”

R. L. Harmon, for the appellant.

Hubbard & Hubbard, for the appellees.

643 TYSON, J. The sole devisee and legatee, Myrtle Stephenson, under the last will and testament of her mother, Mary P. Stephenson, propounded said instrument for probate in the probate court of Pike county. Appellants filed a contest seeking to impeach its validity, alleging as their right to do so, in effect, that they have a lien as judgment creditors of J. T. Stephenson, the husband of the testatrix, who is wholly insolvent; that by reason of said will their debtor is deprived of his distributive share in the property of his wife; that Mary P. Stephenson died seised and possessed of real and personal property, and but for said will their debtor's distributive share in said property would be subject to the payment of their debts; and that, therefore, they have such an interest as that gives them the right to institute the contest.

Demurrers sufficiently raising the question of their right to file and prosecute the contest were sustained by the probate court, and from this decree appellants appealed. Section 4287 of the code of 1896 (Code 1886, sec. 1989), provides: “A will, before the probate **644** thereof, may be contested by *any person interested therein*, or by any person who, if the testator had died intestate, would have been an heir or distributee of his estate by filing,” etc. It is very clear that, unless appellants are within that class of persons included in the words “*interested*

therein," they cannot be heard to complain of the probate of the will.

The contention of appellants is, the words "interested therein" refer to the estate of testatrix, and include every person having an interest in the property attempted to be devised by the will or otherwise, and is not restricted to those named in the will. In other words, every person who would have had any interest in the property of Mrs. Stephenson, should she have died intestate, are included in the words above italicized. If the section of the code above quoted did not contain any other provision conferring the right of contest upon others, who may not be designated in the will, there might be some merit in the contention. But it will be observed that it expressly names the class of persons, though not named in the will, who may contest it. These persons are those "who, if the testator had died intestate, would have been an heir or distributee of his estate"; clearly demonstrating that the legislature construed the words "interested therein" as referring to and including only such persons as took an interest in the estate of testatrix under and by virtue of the provisions of the will.

But conceding for the sake of the argument that these words are susceptible of the construction contended for by appellants, as judgment creditors with a lien of the husband of Mrs. Stephenson, have they such an interest as will authorize them to institute and maintain this contest?

It is fair to presume, and indeed it appears as to one of the appellants, that when J. T. Stephenson contracted these debts the testatrix was in life. The property was hers, and she had the absolute right of disposition over it up to the very moment of her death. There was not the semblance of privity between her and her husband's creditors; she could make such disposition of her entire estate by deed, gift, or will as she chose. Her husband ⁶⁴⁵ had only an expectancy, which might or might not ripen into a vested interest or right, dependent upon his surviving her and her failure to dispose of her property during her life or by will, to take effect at her death. These expectations, while they may have inspired the hopes of his creditors, were not such an estate or interest as they could subject to the satisfaction of their demands. And, however strong may have been the expectations of the husband or those of his creditors, he had no legal estate in expectancy; such an estate is a present vested right contingent only as to possible future enjoyment.

A mere expectation that the wife will make a will in her husband's favor, or will neither give nor grant the estate in her lifetime, and thereby a portion of all will descend to him, is without substance as a present right and incapable of estimate as to future value.

It may be conceded that in a certain sense a creditor is interested in the acquisition of property by his debtor, for the latter's ability to pay depends upon the value of his assets which the debtor can appropriate to the payment of, or the creditor can by legal instrumentalities subject to the satisfaction of, his debt. In this sense, the creditor is interested in the successful and business prosperity of his debtor. Every enterprise or venture engaged in by him increases or diminishes the chances of the creditor to have his debt paid; yet, it cannot be seriously contended that the creditor has the right to institute suits against the debtors of his debtor to enforce the breaches of those contracts, or compel his debtor to do so, however much the collection of his debt may be prejudiced. He has in no sense of the words such a tangible interest as would confer upon him, as "any person interested therein," the right of a suitor. Furthermore, if these creditors have any standing as parties interested, it must be by a theoretical substitution to the rights of the husband as one of the distributees in the estate of the wife had she died intestate. Assuming that on a contest at the instance of the husband the will could be set aside, how can he be compelled to institute or carry on such a contest? If the wife had tendered him as a gift either land or personalty, could his acceptance be compelled, in the interest of creditors, if he chose to decline ⁶⁴⁶ the gift? Both of these inquiries must be answered adversely to appellants' contention. And the fact that appellants might have a lien upon the property described in the will, in the event the husband would contest it successfully, does not give them the legal right to coerce him to institute the contest; and his failure or refusal cannot subrogate them to this right.

In the views we have expressed we are supported in a very able and elaborate opinion of the supreme court of Pennsylvania in the case of *Shepard's Estate*, 170 Pa. St. 323. In that case a creditor of a son of the testator, for whom no provision was made, instituted the contest under the statute of that state requiring that "whenever a caveat shall be entered against the admission of any testamentary writing to probate, and the per-

son entering the same shall allege as the ground thereof any matter of fact touching the validity of such writing, it shall be lawful for the register, at the request of any party interested, to issue a precept," etc. The court said: "We are of opinion that the creditor of an heir is not a party interested, as designated by the statute. We will not undertake, in the absence of express legislation, to give such scope to this language as claimed for it; will not invite every disappointed creditor of every heir to contest the will of a parent who has attempted to provide for those dependent for subsistence on a thriftless son. For no line can be drawn which will limit the grounds of contest, if a creditor of an heir be a party interested; incapacity, undue influence, as well as fraud, may be alleged by one of hundreds of creditors; such an interpretation would increase indefinitely the number of litigants; it would be in the power of anyone to tie up large estates, although the interest of the debtor heir might be comparatively small. If the estates of the dead are to be subjected to such perils, the legislature must open the door, and that by language of no doubtful import": See, also, *Cochran v. Young*, 104 Pa. St. 333; *In re Brown*, 47 Hun, 360.

We have examined carefully the case of *In re Langevin*, 45 Minn. 429, relied upon by appellants. This case is in conflict with what we have said, and an authority ⁶⁴⁷ for appellants' contention. The judge delivering the opinion rests the conclusion upon the sole proposition that a "judgment creditor has always a right to assail or defend against anything which may divest his lien," that "the right to resist the probate is not materially different in principle from that of a judgment creditor to assail a prior forged or fraudulent deed, apparently conveying the lands of the judgment debtor." In the first of these propositions, he assumes that the debtor has such an interest in the property of the testatrix as can be subjected to the payment of his debts. We have shown this to be fallacious. In the second proposition, his illustration is not in point; if he had stated that this right to resist the probate is not materially different in principle from that of a judgment creditor to assail a prior forged or fraudulent deed of a debtor of the debtor of this judgment creditor, his illustration would have been apt; and doubtless his conclusion would have been in harmony with our views.

The decree of the probate court is affirmed.

WILLS — WHO MAY CONTEST.— Under a statute authorizing any person interested in the probate of a will to appear within five years after the probate to contest the validity of the will, one who, after the death of the testator, levied upon and sold the interest of one of his heirs in real property, belonging to him at the time of his death, is entitled, as a party interested, to contest such probate: *Watson v. Alderson*, 146 Mo. 333, 69 Am. St. Rep. 615.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

TEXARKANA v. LEACH.

[66 ARKANSAS, 40.]

MUNICIPAL CORPORATIONS—VACATING STREETS.—The municipal authorities of a city or town have no inherent power to vacate a street therein or any part thereof.

MUNICIPAL CORPORATIONS—VACATING STREETS—IN-JUNCTION.—The vacating of a street by the municipal authorities of a city or town may be enjoined by an adjacent lotowner whose property would thereby be depreciated in value, notwithstanding that it would affect many others in the same manner.

Dodge & Johnson, for the appellants.

J. D. Cook, for the appellee.

41 BATTLE, J. The city of Texarkana is divided by the St. Louis, Iron Mountain & Southern Railway into two parts. A part of the city lying south of the railway is known as "College Hill Addition." This addition and the business part of the city, which lies north of the railway, is connected by a street which is known as the College Hill street. It leads from Broad street on the north across many tracks of railroad in the St. Louis, Iron Mountain & Southern Railway yards to Dudley street on the south. South of the railway, and abutting on College Hill street, Mrs. Nancy Leach owns four town lots. These lots are improved, and one or more of them constitute her homestead. To obviate the necessity of crossing so many railway tracks, and to protect life and property, the city council of Texarkana, in consideration that the railway company would open a new street on a certain route, and across the railway at a

designated point, where the tracks were less numerous than they are at the crossing of the College Hill street, passed an ordinance by which it declared vacated the said crossing of the College Hill street, and authorized the railway company to close ⁴² the same. In pursuance of this ordinance, the railway company was proceeding to open said new street and to close up said crossing, when Mrs. Leach, to prevent it, instituted an action in the Miller circuit court against the city and railway company, and sued out an order therein prohibiting and restraining them from so doing. At the hearing it clearly appeared that the effect of closing and vacating the same would depreciate the value of said town lots of Mrs. Leach from twenty-five to fifty per cent, as well as the value of the town lots of many other persons in the same vicinity; and the court made the order perpetual, and the defendants appealed.

Texarkana being a city of the second class, the ordinance of its city council is void. The municipal authorities of a city or town cannot vacate a street or any part of it without the authority of the legislature. This power does not inhere in a municipality: *Hoboken Land etc. Co. v. Hoboken*, 36 N. J. L. 540; *Polack v. San Francisco Orphan Asylum*, 48 Cal. 490; 2 *Dillon on Municipal Corporations*, 4th ed., sec. 666, and notes. The statutes of this state authorize municipal corporations to lay off, open, widen, straighten, establish, and improve streets, and keep them in repair, but they do not expressly, impliedly, or incidentally confer upon cities of the second class or incorporated towns authority to vacate streets: *Sandel and Hill's Digest*, secs. 5151, 5208.

The vacating and closing of the College Hill street crossing of the railway would be a public nuisance, and an injury to Mrs. Leach specially, notwithstanding it would affect many others in the same manner, and her right to an injunction to prevent it is unquestionable: *Draper v. Mackey*, 35 Ark. 497; *Wesson v. Washburn Iron Co.*, 13 Allen, 95, 90 Am. Dec. 181; *Snell v. Buresh*, 123 Ill. 151; *Corning v. Lowerre*, 6 Johns. Ch. 429; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476; *Pettibone v. Hamilton*, 40 Wis. 402; *Francis v. Schoellkopf*, 53 N. Y. 152; *Hamilton v. Whitridge*, 11 Md. 128, 69 Am. Dec. 184; *Norcross v. Thoma*, 51 Me. 503, 81 Am. Dec. 588, *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314, 321; *Brown v. Watson*, 47 Me. 161, 74 Am. Dec. 482; 2 *Wood on Nuisances*, 3d ed., secs. 663, 669, 670, 672, 674, 676-680.

Let the decree of the Miller circuit court be affirmed.

MUNICIPAL CORPORATIONS CANNOT VACATE STREETS without the consent of the legislature: Note to *Heinrich v. St. Louis*, 46 Am. St. Rep. 494. In this note, pages 493-498, the general subject of vacating streets is discussed and the cases collected: See, also, *Chicago v. Burcky*, 158 Ill. 103, 49 Am. St. Rep. 142, and note.

GAGE v. HARVEY.

[66 ARKANSAS, 68.]

INTOXICATING LIQUORS—CIVIL LIABILITY OF SALOON-KEEPER.—If money is taken from a person by a third party, while the former is intoxicated and incapacitated on liquor sold him in a saloon, the saloon-keeper is not liable for the loss, under a statute requiring him to give a bond conditioned to pay all damages that may be occasioned by reason of liquor sold at his saloon. The liquor thus sold is not the proximate cause of the loss, as that is due to the intervening wrongful act of a third person.

Graves & Martin and M. M. Cohn, for the appellants.

Wood & Henderson, for the appellees.

69 BATTLE, J. The question in this case is, Can one who becomes intoxicated upon liquor sold to him in a saloon or dramshop by the keeper thereof or his agents, and thereby incapacitated to hold and take care of his money, and who, while in that condition, loses it by having it forcibly or without his knowledge or consent taken from his pockets by some person, maintain an action against the keeper and the sureties on his bond to recover the money so taken?

This question arises under section 4870 of Sandel and Hill's Digest, which provides: "Each applicant for a dramshop or drinking saloon license . . . shall enter into bond to the state of Arkansas, in the penal sum of two thousand dollars, conditioned that such applicant will pay all damages ⁷⁰ that may be occasioned by reason of liquor sold at his house of business, . . . which bond shall have two good securities thereon, to be approved of by the court"; and under section 4873 which reads as follows: "Any person aggrieved by the keeping of said dramshop or drinking saloon . . . may have an action on said bond against the principal and securities for the recovery thereof."

The answer to the question obviously depends upon the meaning of the words, "conditioned that such applicant will pay all damages that may be occasioned by reason of liquor sold at his house of business," which are used in section 4870. They

should be construed according to the general rule fixing the limit of the liability of parties for the consequences of their acts in other cases, as they in no way indicate an intent to make the liability of the saloon-keeper an exception to such rule. According to their legal effect, they bind him to pay all damages that may be the natural and proximate result of the use or consumption of liquor sold by him or his agents at his place of business. Further than this the law does not extend the liability on his bond on account of the sale of liquor. As said by Lord Bacon: "It were infinite for the law to consider the cause of causes, and their impulsion one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree": Bacon's Maxims, reg. 1; Broom's Legal Maxims, 165.

The material inquiry in this case is, therefore, whether the use or consumption of the liquor sold by the keeper or his agents at his place of business was the proximate cause of the loss of the money mentioned in the question propounded.

In determining whether an act of a defendant is the proximate cause of an injury, the rule is that the injury must be the natural and probable consequence of the act—such a consequence, under the surrounding circumstances of the case, as might and ought to have been foreseen by the defendant as likely to flow from his act; the act must, in a natural and continuous sequence, unbroken by any new cause, operate as an efficient cause of the injury. If a third person intervenes between the act of the defendant and the injury, and does a culpable act, for which he is legally responsible, which produces ⁷¹ the injury, and without it the injury would not have occurred, and the act of the defendant furnished merely an occasion for the injury, but not an efficient cause, the defendant would not be liable. For no one is responsible for the independent wrong of a responsible person to whom he sustains no relation which makes him liable for his wrong independent of an actual participation therein or connection therewith, as, for instance, the master for the acts of the servant in the scope, course, or range of his employment.

Mr. Wharton states the doctrine in question and answer as follows: "Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative; for the general reason that causal connection be-

tween negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject matter as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is liable to the person injured": Wharton on Negligence, sec. 134 et seq.

We will give a few illustrations of the rule stated, beginning with *Alexander v. New Castle*, 115 Ind. 51, in which a town was sued for injuries alleged to have been caused by a pit or excavation in a street, which the town wrongfully and negligently suffered and permitted to remain open and uninclosed. The plaintiff was a special constable, and was thrown into the pit by a prisoner he had under arrest, as they were passing and opposite the pit, and was injured; the prisoner escaping. It was insisted that, as the pit or excavation, so wrongfully and negligently permitted to remain open and uninclosed, afforded the prisoner the opportunity of throwing the plaintiff into it, as a means of escape, it was, in legal contemplation, the proximate cause of the injuries which the plaintiff received. But the court held that the prisoner was ⁷² clearly an intervening as well as an independent human agency in the infliction of the injuries of which the plaintiff complained, and that the town was not liable. In that case the pit afforded the opportunity to inflict the injury, but was not an efficient cause of it.

In *Vicars v. Wilcocks*, 8 East, 1, the plaintiff sued the defendant for slander, which was uttered in a conversation with persons who were not his employers, but was communicated to his master, and attempted to hold him liable for the damage he suffered by reason of his master discharging him, in consequence of the slander, before the expiration of his term of service. And Lord Ellenborough said that the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration; and here it was an illegal consequence, a mere wrongful act of the master for which the defendant was no more answerable than if, in consequence of the words, other persons had afterward assembled and seized the plaintiff, and thrown him into a horse pond by way of punishment for his supposed transgression. And his lordship asked whether any case could be mentioned of an action of

this sort sustained by proof only of an injury sustained by the tortious act of a third person: *Cuff v. Newark etc. Ry. Co.*, 35 N. J. L. 31, 10 Am. Rep. 205. *

In *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 359, the plaintiff's husband, while in a state of intoxication caused by liquors obtained by him from the defendant, insulted or menaced one McGraw, who thereupon stabbed him, inflicting a wound whereof he died shortly afterward. The court held that the plaintiff was not entitled to recover under a statute which gave a wife "who shall be injured in person, property, or means of support" in consequence of the intoxication of any person "a right of action against the person who caused the intoxication, and made such person liable for all damages sustained and for exemplary damages." Mr. Justice. Scholfield, for the court, said: "It has also been held that the intervention of the independent act of a third person between the wrong complained of and the injury sustained, which was the direct or immediate cause of the injury, breaks the causal connection; and, consequently, there can, in such case, be no recovery except as against the person ⁷³ whose immediate agency produced the injury. . . . Here, the death not resulting from intoxication or from any disease induced or aggravated by the use of liquor, but solely from the direct and willful act of McGraw, we have a case clearly within this principle."

In the case before us, the intervening act produced the injury complained of, and was the wrongful act of a third person for which he was legally responsible. The sale and consumption of the liquor may have furnished the opportunity or occasion for the wrongful act of the third person, but was not the proximate cause of the injury. Hence the saloon-keeper, who sold the liquor which produced the intoxication, and the sureties on his bond, are not liable for damages: *Cuff v. Newark etc. Ry. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205.

The judgment of the circuit court is reversed as to George Sargianovich, the keeper of the saloon, and J. Kempner and D. Beffa, the sureties on his bond, and is affirmed as to Vincent Gage.

INTOXICATING LIQUORS—CIVIL LIABILITY OF THE SELLER.—Under a statute giving wives or other persons a right of action, for injury by reason of the intoxication of any person, against the seller of liquors, the intoxicated person himself has no right of action against the seller for money stolen from him when drunk: *Brooks v. Cook*, 44 Mich. 617, 38 Am. Rep. 232; nor can a

wife recover damages from the seller of liquor to her husband, who becomes intoxicated thereby, and, in consequence of abusive language, is killed by a third party: *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 359, and note.

HINER v. WHITLOW.

[66 ARKANSAS, 121.]

USURY—ASSIGNEE OF MORTGAGE.—One who buys land expressly subject to an existing mortgage, or who undertakes, as part of the consideration for the land, to pay the debt secured by such mortgage, cannot defeat the foreclosure of the mortgage by a plea of usury.

USURY—CONSTRUCTION OF STATUTE.—A person who purchases land, and, in part payment therefor, undertakes to pay the debt secured by an existing mortgage thereon, cannot defeat a foreclosure of such mortgage on a plea of usury, under a statute conferring upon a purchaser of real estate the right to set up usury in an existing mortgage thereon in so far as such mortgage is in conflict with his rights.

C. E. Warner, for the appellants.

T. E. Ward, for the appellee.

122 **BATTLE, J.** "On July 31, 1896, appellee filed his complaint in this action against appellants, alleging that on February 20, 1891, one Watts and wife made a mortgage to Bleecker Luce to secure the loan of sixteen hundred dollars, made by H. L. Monroe, conveying certain described real estate in the city of Fort Smith, and that said Luce and Monroe in 1891 assigned said debt and mortgage to appellee; that on April 5, 1893, said Watts and wife sold their equity in such property to said H. L. Monroe, who, on January 12, 1894, sold and conveyed said property to one Vance, who assumed the mortgage"; that afterward, on the 12th of June, 1894, Vance sold the real estate to Edwin Hiner, who, in part consideration thereof, undertook and agreed to pay the debt secured by the mortgage made by Watts and wife, and did at the time pay all the overdue interest, and two hundred and fifty dollars of the principal of the debt, and at his request the property was conveyed to his wife, appellant, Martha Hiner; and alleged that the principal of the debt and two years' interest thereon were due and unpaid, and that Hiner and wife refused to pay the same; and asked for a foreclosure of the mortgage.

Hiner failed to answer, but his wife did, alleging as her only defense that the debt and mortgage were void for usury, 123

and that, if valid at any time, they had been satisfied and discharged.

The facts, as shown by the evidence, were as follows: On the twentieth day of February, 1891, M. C. Watts and his wife conveyed certain real estate to Bleecker Luce in trust to secure a loan of sixteen hundred dollars made to him by Harry L. Monroe, which was evidenced by a bond therefor, with ten coupons for interest attached. In February, 1891, Luce and Monroe, for a valuable consideration, transferred the bond and coupons and the deed of trust or mortgage to appellee, R. W. Whitlow. On the twelfth day of January, 1894, Monroe sold and conveyed the real estate to one M. D. Vance, who, as part consideration therefor, agreed and undertook to pay off and discharge the deed of trust or mortgage executed by Watts and wife. Afterward, on the 12th of June, 1894, Vance sold the property to Edwin Hiner, who caused the same to be conveyed to his wife, Martha L. Hiner, subject to the mortgage thereon, which was executed by Watts and wife. The property sold was worth about two thousand dollars, and the consideration received by Vance was property worth about one hundred and sixty dollars, the difference between the value of that received and conveyed being about the sum due on the mortgage debt. Evidence was adduced at the hearing tending to prove that Hiner, in part consideration for the property conveyed to his wife, agreed with Vance to pay off and discharge the mortgage; and evidence was also adduced tending to prove that he did not enter into such agreement, but purchased subject to the mortgage. The amount due and unpaid on the debt at the time of the hearing was sixteen hundred and forty-two dollars and ninety-five cents.

The court rendered a decree in favor of Whitlow, foreclosing the mortgage, and a judgment against Hiner and his wife for costs, and they appealed.

According to any view that can be taken of the terms of the contract between M. D. Vance and Edwin Hiner or Mrs. Hiner, the last two persons named will not be allowed to set up usury to defeat the foreclosure of the mortgage sued on, or the collection of the debt secured thereby, unless authorized to do so by a statute. If they purchased the land expressly subject to the mortgage, the land was as effectually charged with the encumbrance of the mortgage debt as it would have been had they expressly assumed the payment of the debt, or had executed ¹²⁴ a mortgage to secure it. The land became, by the

terms of the contract, the primary fund for the discharge of the debt. The theory is, that the amount of the mortgage was deducted from the purchase money, and it would be inequitable to allow them to take advantage of the invalidity of the mortgage, when the vendor had virtually furnished them with the means of discharging it. Their position, in principle, is in no respect different from what it would have been had their vendor counted out in cash the sum specified in the mortgage, and placed it in their hands as his messengers, with directions to pay it to the mortgagee in discharge of the mortgage. They cannot any more defeat the appropriation intended to be made by the plea of usury in one case than they can in the other, and they cannot in either: *Morris v. Floyd*, 5 Barb. 130, 134, 135; *Freeman v. Auld*, 44 N. Y. 50; *Lee v. Stiger*, 30 N. J. Eq. 610; *Pinnell v. Boyd*, 33 N. J. Eq. 190; *Hardin v. Hyde*, 40 Barb. 435; 1 *Jones on Mortgages*, 5th ed., secs. 735, 736.

If Hiner and wife undertook, as a part of their contract with Vance, to pay off the indebtedness secured by the mortgage, they will not be allowed to defeat the enforcement of the mortgage by a plea of usury, unless allowed to do so by a statute. Their contract was not usurious. A part of the purchase money to be paid for the land was the amount due on the mortgage debt. As in the former case, they purchased only the equity of redemption, and to allow them to defeat the mortgage would enable them to acquire the land for a sum considerably less than they agreed to pay. They stand in no better position than they would had they purchased subject to the mortgage: *Stiger v. Bent*, 111 Ill. 328; *Log Cabin etc. Assn. v. Gross*, 71 Md. 456; *Bridge v. Hubbard*, 15 Mass. 103, 8 Am. Dec. 86; *Pickett v. Merchants' Nat. Bank of Memphis*, 32 Ark. 346, and cases cited above.

Can they, Hiner and wife, defeat the mortgage by setting up and maintaining a plea of usury, under the act entitled, "An act to give effect to the constitutional provisions against usury," approved March 3, 1887? That act provides as follows:

"Section 1. That every lien created or arising by mortgage, deed of trust, or otherwise, on real or personal property, to secure the payment of a contract for a greater rate of interest ¹²⁵ than ten per centum per annum, either directly or indirectly, and every conveyance made in furtherance of any such lien is void, and every such lien or conveyance may be canceled and annulled at the suit of the maker of such usurious contract, or his vendees, assigns, or creditors. The maker

of a usurious contract may, by suit in equity against all parties asserting rights under the same, have such contract, and any mortgage, pledge, or other lien, or conveyance executed to secure the performance of the same, annulled and canceled, and any property, real or personal, embraced within the terms of said lien or conveyance, delivered up if in possession of any of the defendants in the action, and, if the same be in the possession of the plaintiff, provision shall be made in the decree in the case, removing the cloud of such usurious lien, and conveyance made in furtherance thereof, from the title to such property. And any person who may have acquired the title to, or any interest in, or lien upon, such property by purchase from the makers of such usurious contract, or by assignment or by sale under judicial process, mortgage, or otherwise, either before or after the making of the usurious contract, may bring his suit in equity against the parties to such usurious contract and anyone claiming title to such property by virtue of such usurious contract, or may intervene in any suit brought to enforce such lien, or to obtain possession of such property under any title growing out of such usurious contract, and shall by proper decree have such mortgage, pledge, or other lien, or conveyance made in furtherance thereof, canceled and annulled in so far as the same is in conflict with the rights of the plaintiff in the action.

"Sec. 2. That any creditor whose debtor has given a lien by mortgage, pledge, or otherwise, on real or personal property, subject to execution to secure the payment of a usurious contract, may bring his suit in equity against the parties to such usurious contract, and recover judgment for his debt against the debtor, and a decree canceling and annulling such usurious lien, and directing the sale of the property to satisfy the plaintiff's judgment and costs, and any surplus that may remain after satisfying the plaintiff's judgment shall be paid to the debtor."

Only four classes of persons are allowed by this act to institute ¹²⁰ an action to set aside a mortgage or deed of trust on account of usury, and they are the maker, his vendees, assigns, or creditors. The vendees and assigns can do so only in so far as it may be necessary to protect their rights in the property encumbered. The language of the act is: "And any person who may have acquired the title, or an interest in, or lien upon, such property by purchase from the makers of such usurious contract, or by assignment or by sale under judicial pro-

cess, mortgage, or otherwise, may institute suit in equity, . . . and shall by proper decree have such mortgage, pledge, or other lien or conveyance made in furtherance thereof, canceled and annulled in so far as the same is in conflict with the rights of the plaintiff in the action." The creditor can do so only when he recovers a judgment against the maker. So Hiner and wife cannot defeat the mortgage in this case on account of usury, because they acquired only the right to redeem the property mortgaged—that is, that part of the estate or interest in the property not covered by the mortgage; and for the further reason that the mortgage is in no wise in conflict with their rights.

The decree of the circuit court is, therefore, affirmed, except so much thereof as is a judgment against Edwin Hiner for costs; to that extent it is reversed.

Bunn, C. J., absent.

USURY.—A purchaser of real estate subject to a usurious mortgage cannot set up the usury against a bill for foreclosure: *Stephens v. Muir*, 8 Ind. 352, 65 Am. Dec. 764; *Stein v. Indianapolis Bldg. etc. Co.*, 18 Ind. 237, 81 Am. Dec. 353; and this is true whether there is an express promise on the part of the purchaser to pay the encumbrance or not: *Note to Stein v. Indianapolis Bldg. etc. Co.*, 81 Am. Dec. 358. On the general subject of usury, see the monographic notes to *Davis v. Garr*, 55 Am. Dec. 391-400; *Sylvester v. Swan*, 81 Am. Dec. 736-738.

RUSSELL v. STATE.

[66 ARKANSAS, 185.]

BIGAMY—DEFENSE.—The fact that a person honestly believes that he has been divorced from his first wife before marrying again is no defense to a prosecution for bigamy, but evidence of such fact is admissible in mitigation of punishment.

Prosecution and conviction of bigamy. Defendant appealed. The evidence tended to show that, when the appellant married the second time, his first wife was living, and that he had not been divorced from her. He sought to show on the trial that, at the time of his second marriage, he honestly believed that he had been divorced. The appellant offered in evidence a certificate of the clerk of the circuit court of the county of Nevada, state of Arkansas, to the effect that the appellant had been divorced from his first wife. He also offered to prove that he had paid one Booth for procuring him such divorce, and that

by fraud he had been induced to believe at the time of his second marriage that such divorce had been procured. The trial court refused to allow such evidence to be admitted.

J. E. Cook and L. A. Byrne, for the appellant.

J. Davis, attorney general, and C. Jacobson, for the appellee.

¹⁸⁷ HUGHES, J. Section 1480 of Sandel and Hill's Digest provides: "Every person having a wife or husband living, who shall marry any other person, whether married or single, except in the cases specified in the next section, shall be adjudged guilty of bigamy."

"Sec. 1481. The last preceding section shall not extend to the following persons or cases: ¹⁸⁸ 1. To any person, by reason of any former marriage, whose wife or husband by such marriage shall have been absent for five successive years, without being known to such person within that time to be living; 2. To any person whose wife or husband has been absent from the United States for the space of five years; 3. To any person whose former marriage has been dissolved by a court of competent authority; 4. To any person whose former marriage has been pronounced void by the decree or sentence of a court of competent authority, on the ground of the nullity of the marriage contract; 5. To any person by reason of any former marriage contract by such person, within the age of legal consent, and which has been annulled by a decree of a court of competent authority."

Section 1482 provides: "If any unmarried person shall knowingly marry the husband or wife of another, in any case in which said husband or wife would be punished according to the foregoing provisions, such person, on conviction, shall be subject to the same punishment as is prescribed in cases of bigamy."

We find that the rulings of the court were correct in refusing to allow proof that the defendant believed he had been divorced from his first wife at the time of his second marriage, as this was no defense. The cases cited by the attorney general in his brief sustain the ruling of the court upon this question. These cases are to the effect that "the material facts of the crime of bigamy are the first and second marriages, and the fact that the first consort was alive and undivorced at the date of the void marriage. From such facts a bigamous intent may be inferred": Underhill on Evidence, sec. 398. That defend-

ant had been told and believed that his first marriage was void, and acted on such belief, is no defense to a prosecution for bigamy: *State v. Sherwood*, 68 Vt. 414. An honest and reasonable belief in the death of a former wife is no defense to a prosecution for bigamy: *Commonwealth v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468. It is the marrying by a person who has a husband or wife living that constitutes the offense under our ¹⁸⁹ statute, and the offense is complete under the second marriage: *Scoggins v. State*, 32 Ark. 205. Advice of counsel that there is no impediment to the second marriage is no defense to a prosecution for bigamy: *People v. Weed*, 29 Hun, 628; *State v. Hughes*, 58 Iowa, 165. To support an indictment for bigamy, it is sufficient to prove that defendant, being at the time lawfully married to one person, has married another: *Commonwealth v. Mash*, 7 Met. 472.

In *State v. Armington*, 25 Minn. 29, the facts, briefly stated, were as follows: Armington was indicted in Minnesota for bigamy. He offered in evidence a certified copy of a decree of divorce between him and his first wife. This divorce was obtained in Utah. Counsel for the state objected to its admission, on the ground that at the time both parties were residents of Minnesota. The objection was sustained. Counsel for the defendant then offered to show by the paper and parol testimony of defendant that, at the time of the second marriage, he had this paper in his possession, and believed the decree to be effectual to make him a single man, and believed himself to be such, and that he would not have married again had he not believed such; and he had submitted the paper to a good attorney in this state, and had been advised that the paper was sufficient; and had married, relying on such advice and a copy of the decree, believing that he had a right to. All of this evidence was excluded, and on appeal to the supreme court that tribunal said: "To disprove any criminal intent, the record was also offered in evidence, coupled with an offer to show that the defendant, acting under the advice of counsel, believed in the validity of such alleged divorce, and that he contracted his second marriage in this belief. . . . If the pretended decree upon which he relied was in fact illegal and void, because made by a court having no jurisdiction, it afforded him no protection against the consequences of a second marriage, whatever may have been his motives or his belief in respect to the validity of the decree."

We think the evidence offered by the defendant affecting his intention and good faith in his second marriage was competent, not to show that he was not guilty, but because it might have affected the term of his imprisonment. But as defendant ¹⁹⁰ was given the lightest punishment fixed by the statute, its refusal is not reversible error.

Affirmed.

BIGAMY—DEFENSE.—The fact that the defendant had a bona fide and reasonable belief, when contracting the second marriage, that his first wife was dead does not entitle him to acquittal: *Commonwealth v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468, and note; neither does a mistaken belief that his first marriage was void: *Medrano v. State*, 32 Tex. Cr. Rep. 214, 40 Am. St. Rep. 775, and note.

DAVIS v. WEBBER.

[66 ARKANSAS, 190.]

ATTORNEY AND CLIENT—CONTRACT FOR CONTINGENT FEE—CHAMPERTY.—A contract between an attorney and client allowing the former a contingent interest in the subject matter of litigation as compensation for his professional services is valid, and not champertous, unless some unfair advantage is taken of the client.

ATTORNEY AND CLIENT—VALIDITY OF AGREEMENT OF CLIENT NOT TO SETTLE LITIGATION.—A provision in a contract between attorney and client preventing the client from settling the controversy without the consent of the attorney, if it furnishes an inducement for entering into the contract, renders the whole contract void.

ATTORNEY AND CLIENT—INTEREST OF ATTORNEY IN JUDGMENT.—If a suit has progressed to judgment, an attorney may establish his interest in such judgment resulting from his services, and this neither party to the litigation can ignore. They may settle if they wish, but before there can be any satisfaction of the judgment, the attorney's fee must be paid.

ATTORNEY AND CLIENT—AMOUNT OF FEE UNDER VOID CONTRACT.—If a contract between attorney and client is void because of a stipulation that the client shall not settle or compromise the controversy without the attorney's consent, the court may grant compensation for the attorney's services under the rule of the quantum meruit, and may look to such contract to ascertain what the parties themselves think such services are reasonably worth.

ATTORNEY AND CLIENT—COMPENSATION, HOW DETERMINED.—The professional standing of an attorney, the amount of his professional business, and the nature and importance of the controversy in which the services are rendered, must all be considered in fixing the value of such services.

ATTORNEY AND CLIENT—ATTORNEY'S LIEN.—In a suit to declare and enforce an attorney's lien for a fee for services ren-

dered in a certain suit, on property which is received as a result of that suit, it is error to include in the judgment a fee for services rendered in a different suit.

Williams & Arnold, for the appellant.

S. R. & A. Cockrill, for the appellee.

192 WOOD, J. This is a suit by Webber against Davis to recover the sum of \$2,885.50 for services, as an attorney at law, under a certain contract, and to declare and enforce a lien for such sums upon certain property. The contract is as follows: "Whereas, by the judgment of the Miller county circuit court in the case of Mansur v. Tebbetts Implement Co., and Hargadine-McKittrick Dry Goods Co. v. Robert Ellis, in which N. L. Davis was interpleader, the proceeds of the sale of the stock of goods bought from said Ellis by said Davis was adjudged to be the property of N. L. Davis, and ordered to be immediately turned over to him by A. S. Blythe, sheriff, and a similar order was issued by the Hempstead circuit court on the other attachments against Ellis, taken to that county on a change of venue; and demand having been made on said sheriff, and he failing to pay the same, it becomes necessary to proceed against him on his official bond, and the said Davis having employed the said T. E. Webber for that purpose: Now, therefore, it is agreed and understood, by and between the said T. E. Webber and the said N. L. Davis, that T. E. Webber is to have, as fees for his services as attorney therein, the ten per cent per month affixed by the statute as penalty in such default, and that N. L. Davis is to make no settlement with said sheriff, or said bondsmen, or either of them, without the assent of the said T. E. Webber. In the event a proposition of settlement or compromise is submitted, either by the said sheriff and his bondsmen, or by the said T. E. Webber and N. L. Davis, or either of them, the same is not to be accepted unless agreed to by both T. E. Webber and N. L. Davis, and in such proposition, so mutually agreed to, such allowance shall be made for T. E. Webber's attorneys' fees as may be agreed ¹⁹³ upon by said Webber and said N. L. Davis, or else said proposition shall be rejected. Witness our hands this thirtieth day of April, 1894, to this agreement, which is separate and distinct from, and in no wise affects or impairs, any agreement heretofore entered into as to attorneys' fees on the interpleas filed for N. L. Davis in said cause.

(Signed) "N. L. DAVIS.
"T. E. WEBBER."

The amount which the sheriff was ordered to pay Davis was \$7,114.50. The sheriff failing to pay said amount upon the demand of Davis, Webber was employed, as indicated supra, to proceed against the sheriff and his bondsmen to collect the money. Accordingly, Webber, as attorney for Davis, instituted proceedings against the sheriff and his sureties by motion for summary judgment, and on September 14, 1894, obtained judgment against them for \$7,034.50, the amount sued for, less the taxes which the sheriff had paid. The judgment was also for interest at the rate of six per cent per annum, and ten per cent per month penalty, on the above amount from April 23, 1894, until paid. It was provided in the judgment that the amount of principal, interest, and penalty should not exceed \$10,000, the amount of the sheriff's bond. The principal, interest, and penalty would have exceeded \$10,000 at the time the judgment was rendered. So the judgment obtained by Davis against the sheriff and his bondsmen was for \$10,000, and the amount due Webber of said judgment under the contract with Davis was something over \$2,800. Webber filed his lien upon said judgment March 21, 1895. In April thereafter Davis accepted of the sheriff and his sureties certain notes and real estate in satisfaction of the judgment against them. This was done without the payment of Webber's fee, and, as he claims, without his consent; hence this suit.

Several defenses were presented. The only ones we need consider are: 1. That the contract was void; 2. That there can be no recovery except upon a quantum meruit, and, in that case, Davis contends, the decree for \$1,997.05, was excessive.

1. Was the contract void? Long ago (1857) this court, in ~~184~~ an elaborate and learned opinion by Mr. Justice Scott, traced the origin, and reviewed the history, of the law of maintenance and champerty, as enacted into statutes and declared by the courts of England: *Lytle v. State*, 17 Ark. 608, 663 et seq. The conclusion reached was that such laws were not applicable to contracts between attorney and client providing remuneration to the attorney for services rendered his client in conducting litigation. The English rule avoiding such contracts upon the ground of maintenance and champerty was repudiated, as repugnant to our constitution and statutes, and the court showed, and might have added, that such a rule was contrary to the genius of our institutions. As was said by Mr. Justice Cobb in *Newman v. Washington*, Mart. & Y. 79: "It is consonant with the nature of our institutions that faithful labors should be

rewarded by reasonable remuneration, and he who works at the bar, and he who works at the plane, the physician, the farrier, the carpenter, and the smith, should all possess an equality of rights, and be paid what they reasonably deserve to have, according to the nature and value of their respective services." And he continues: "Here we have no separate orders in society, none of those exclusive privileges which distinguish the lawyer in England, in order to attach him to the existing government, and which constitutes him a sort of noble in the land. . . . But, upon the whole, a lawyer in England is as different from a lawyer here as a man clad in a plain suit of black or blue—his head such as nature made it—is unlike him in appearance who has his body surrounded with a long robe and his head covered with a large wig." As was said by Chief Justice Gibson in *Foster v. Jack*, 4 Watts, 334: "The dignity of the robe, instead of any principle of policy, furnishes all the arguments that can be brought to support" the English rule: *Kennedy v. Broun*, 7 L. T., N. S., 626; 9 Jur., N. S., 119.

More than once since the decision in *Lytle v. State*, 17 Ark. 608, this court has recognized the validity of contracts between attorney and client, allowing the former a contingent interest in the subject matter of litigation as compensation for his professional services: *Brodie v. Watkins*, 33 Ark. 545, 34 Am. Rep. 49; *Jacks v. Thweatt*, 39 Ark. 340; *Cockrill v. Sanders* (Ark., Jan. 16, 1888), 8 S. W. Rep. 831.

¹⁰⁵ We are aware that some American courts of eminent respectability have approved the English rule concerning such contracts: *Miles v. Collins*, 1 Met. (Ky.) 308; *Dumas v. Smith*, 17 Ala. 305; *Price v. Carney*, 75 Ala. 552. But see *Coquillard v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362; *Orr v. Tanner*, 12 R. I. 94. See *Gilman v. Jones*, 87 Ala. 702, for the doctrine now in Alabama.

But the modern, and decidedly prevailing, view in this country is in accord with the rule adopted by this court, to uphold such contracts: See cases collected in 5 Am. & Eng. Ency. of Law, 2d ed., 826, and in note to *Kennedy v. Broun*, 9 Jur., N. S., 119; 2 Am. Law. Reg. (1862-63) 372.

Such contracts, however, should be characterized by the utmost good faith on the part of an attorney toward his client, because of the confidence reposed in him. The courts will scrutinize such contracts closely, to see that *uberrima fides* has been preserved. If there has been "suppression or reserve of

fact or exaggeration of apprehended difficulties," or any circumstances of the confidential relationship have been seized upon by the attorney to consummate an oppressive contract with the client, the courts will not hesitate to express their disapprobation of such contracts, and, when called upon, will set them aside or refuse their enforcement: *Ex parte Plitt*, 2 Wall. C. C. 480; *Chester County v. Barber*, 97 Pa. St. 455; *Stewart v. Houston etc. Ry. Co.*, 62 Tex. 248; 5 Am. & Eng. Ency. of Law, 2d ed., 827. This court, in *Jacks v. Thweatt*, 39 Ark. 340, passed upon a contract containing a stipulation whereby the clients agreed "to make no settlement without consulting their attorneys." But the question as to whether that clause rendered the contract void was not raised or decided in that case.

So far as the amount of the fee as fixed by the contract is concerned, there is nothing in the record to show any unjust or unfair advantage taken by Webber of his client, Davis, in determining the amount. At the time the contract was executed (30th of April, 1894), only seven days had expired from the time (23d of April, 1894) demand was made upon the sheriff for the money which he had been ordered to pay over to Davis. Under the contract Webber was to get no fee unless there was a recovery. While the amount Davis was to receive upon recovery was fixed and certain, the amount Webber was to receive ¹⁸⁹⁶ was contingent, depending entirely upon the time that elapsed from the demand until the amount sued for was collected. At the time Webber entered into the contract, neither he nor Davis could know what time would intervene before a settlement might be reached. If the sheriff and his bondsmen had settled the amount, with Webber's consent, in a few days after the contract between Davis and Webber was executed, the amount of Webber's fee would have been very small as compared with the amount of same at the time of the judgment. Davis appears to have been well pleased with the agreement. He says: "I told him [Webber] that if he would agree to collect the \$7,114.50 for me, he could have any penalty that might be allowed; and if he would agree to that, and agree to set aside all the money that was collected until the whole amount of the principal was collected for me, that he could have the amount that would be allowed as a penalty." Witness Smith, one of the sheriff's sureties, and who was acting as an intermediary between the sheriff and his other bondsmen and Davis, to bring about a settlement before suit was instituted, and who

had made a proposition of settlement to Davis, which Davis had declined, said concerning this: "I told him I was sorry, and that he would regret it more than I ever would; that in twenty-two or twenty-five years from now, when he hadn't got a nickle out of it, and a big lawyer's fee on his shoulders, he would think that Smith was right once. He [Davis] said: 'As to my lawyer's fee, Mr. Smith, I have a contract right here in my safe with a good attorney that I am never out a cent attorney's fee, but I must have all of my money, before there is any liability for attorney's fee.' I said to him, 'Mr. Davis, you certainly have an elegant contract.' He says, 'I think I have.'" Davis was a merchant, a man of intelligence, and, as the record shows, of considerable experience in litigation, and in the matter of contracts for lawyers' fees.

A contract with his attorney for fees, which, as the witness reports him, Davis regarded as "elegant" in the beginning of his important litigation, cannot be avoided for the reason simply that, in the end, it did not bring to him the results which he had anticipated under it. Yet this is about the sum total of his grievance, so far as we can see. Therefore, we do not consider ¹⁰⁷ what is said by the learned counsel for Davis in their excellent brief, as to good faith, fraud, oppression, extortion, the "severe relationship of trustee and cestui que trust," etc., and the authorities cited on these subjects, as applicable under the facts of this case. The facts, as we view them, fail to show any abuse whatever of the confidential relation of attorney and client, and, were this all, we would uphold the contract.

But it is contended that the provision in the contract preventing Davis from settling the controversy without the consent of Webber is void. This contention is well taken. Such a stipulation is against public policy. "The law," says Judge Dillon in *Ellwood v. Wilson*, 21 Iowa, 523, "encourages the amicable adjustment of disputes, and a construction of a contract which would operate to prevent the client from settling will not be favored." It is said in *Lewis v. Lewis*, 15 Ohio, 715, that "a contract with an attorney to prosecute a suit containing a stipulation that the party should not have the privilege to settle or discontinue it without the assent of the attorney would be so much against good policy that the court would not enforce it." In *North Chicago etc. Ry. v. Ackley*, 171 Ill. 100, it is held "that any contract whereby a client is prevented from settling or discontinuing his suit is void, as such agreement would foster and encourage litigation."

The impeachment of the contract under consideration is peculiarly proper upon the ground of public policy, regardless of the fairness and good faith of the parties in executing it. We would not call in question the good faith of the parties to the contract. The record would not justify our doing so. Davis was anxious to procure the services of an attorney to collect the money coming to him without paying out any "ready cash," and, as he says, he did not know whether any penalty would be allowed. Webber was perfectly willing to take the penalty for his fee, and risk the chance of recovering it. This, at the time, was doubtless considered an admirable arrangement by both, and, but for the clause prohibiting Davis making a settlement without the assent of Webber, we can see no objection to it. This clause was fatal to the entire contract. It is not severable from it. It seems to have been an inducement for entering upon the contract. It is impossible for us to say that ¹⁹⁸ the parties would have entered upon the contract at all without this clause. To approve such a contract as a precedent would be unprecedented. It is a wise public policy to allow the parties to a lawsuit, or to disputes that have not even progressed to the proportion and dignity of a lawsuit, to settle their differences without hindrance from disinterested parties. Parties should be permitted to beg or buy their peace at any time. It would be difficult to estimate the monstrously unjust consequences that might result to parties willing and ready to settle a demand of this kind, if it lay in the power of an attorney to impede or control such settlement, especially when his interest in doing so was quickened by the stimulating influence of a fee which was accumulating at the appalling rate of \$700 per month. It could hardly be expected that such a condition would expedite the litigation or the settlement.

When a lawsuit has progressed to judgment, then, of course, the attorney, under the statute (Sandel and Hill's Digest, sec. 4223) may establish his interest in the judgment which has resulted from his services, and this neither party to the litigation can ignore. Then the parties may settle if they wish, but, before there can be any satisfaction of the judgment, the attorney's fee must be paid. Before judgment the attorney can only trust to the integrity and good sense of his client not to compromise without advising with him and making satisfactory arrangements as to the fee. If the attorney should have for his client one who has neither the good sense to consult him nor the integrity to pay him, then, indeed, would he be unfortunate. But

where this is the case, generally the attorney, unless he expects to give his services a quiddam honorarium, well deserves censure rather than sympathy for having such a client, and will have to suffer the consequences.

2. While the contract sued on is against public policy, and therefore void, yet the making of such a contract is neither *malum prohibitum* nor *malum in se*. It is not even of questionable propriety. Therefore, the courts, although refusing to enforce such a contract, will nevertheless grant compensation for valuable services rendered under it, upon the rule of *quantum meruit*: 5 Am. & Eng. Ency. of Law, 2d ed., 828, and authorities cited.

¹⁹⁹ The question as to the amount of recovery is one of fact, and one most difficult to decide, in view of the varying opinions of gentlemen distinguished in the profession as to the value of such services, and also the conflicting opinions of witnesses as to the value of the property accepted by Davis in satisfaction of the judgment, all of which it is proper to consider in fixing the value of the service under a *quantum meruit*.

The court may look to the contract for the purpose of ascertaining what the parties themselves thought the services were reasonably worth, and, in connection with the other evidence, to determine what was the reasonable value of the service actually rendered: *Shumate v. Farlow*, 125 Ind. 359, 361; *La Du King Mfg. Co. v. La Du*, 36 Minn. 473; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189. But it cannot be taken as the criterion of value for such services: *Holloway v. Lowe*, 7 Port. 488; *Elliott v. McClelland*, 17 Ala. 209.

The professional standing of the attorney, the amount of his professional business, and the nature and importance of the controversy in which the services were rendered, are all to be considered: 1 *Lawson's Rights, Remedies, and Practice*, sec. 198.

Webber was "no cheap man" and "no mean lawyer." On the contrary, the character of the litigation, which the record discloses he conducted to a successful termination, and the fees he demanded and received, show him to have been a lawyer of good ability, who doubtless deserved, demanded, and received pay commensurate with his labors and his talents. Now, this being true, what was the reasonable value of the services he rendered Davis in his controversy with the sheriff and his bondsmen? It would serve no useful purpose to set out in detail, and to discuss at length, the evidence (which is voluminous) upon which we base our conclusions. A less intelligent

lawyer than Webber must have known, when he entered upon the contract, that there would be but little work and no difficulty in reducing the demand of Davis to judgment. All but a trifle of the amount had been judicially ascertained, and, from the lawyer's standpoint, it could have been but a simple and easy matter to file the motion and have summary judgment entered; for, in the state of Davis' claim, however hotly contested, there could be absolutely no defense ²⁰⁰ to it. There could be no uncertainty as to the amount, nor as to the result of the judgment, as far as the principal of the claim was concerned. The only uncertainty and contingency whatever related to the penalty, and there was no contingency about obtaining judgment for this, but only uncertainty as to the amount that would be allowed, depending upon the time that would intervene between the demand and the judgment. It will not do to liken a case of this kind to a suit for damages for personal injury, or any other kind of a suit, where both the question of obtaining judgment and the amount thereof, if obtained, are trembling in the balance. This, in fact, is a suit upon a liquidated demand, where there was no issue as to the amount of the judgment, and no doubt about obtaining it. The proof shows that the lawyer's fee, based upon the contingency of final recovery, would be much less in the latter case than in the former. Necessarily so, because of the diminished labor in its prosecution, and the anxiety as to the result.

The paramount obstacle that lay in Webber's path was not the difficulty and labor of obtaining judgment, but in collecting it. But even this, in view of actual results, was reduced to the minimum; for while suits to recover at one time were thought to be necessary, and investigations made and memoranda taken for the preparation of bills to that end, as a matter of fact, such bills were never filed, and there was no long and complicated litigation to collect what was finally received. Now, Webber, under the quantum meruit, should receive pay only for the services actually rendered. Suits that were never prosecuted should not be considered. We would not minimize the value of his excellent labors. His known ability, persistence, and vigilance doubtless moved the sureties of the sheriff to make the offer of compromise, both before and after the suit was instituted. We are willing to concede this. Then how does the case stand? Webber instituted a suit against the sheriff and his bondsmen for the sum of \$7,114.50, and which he must have known at the time, unless settled by them before,

would amount to \$10,000, including interest and penalty, by the time judgment would be obtained. To this claim, which had been ascertained by the court, and the amount of penalty fixed by the statute, even though ²⁰¹ vigorously contested, there could be no defense. He succeeded in obtaining judgment for \$10,000, and recovered of the amount according to the estimate of the property by the court below, the sum of \$8,850. A majority of the judges are of the opinion that this is the most favorable view of the case that can be taken for Webber; and it is, in our opinion, the correct view. When so considered, under all the proof, the sum of \$1,000 would be a reasonable and fair compensation for all his services. This would give him ten per cent of the amount of the judgment, or ten per cent of the amount collected, and \$115 for the work done in preparing for suits to uncover, which would be ample to pay for that.

3. The court rendered judgment for \$152 for services in a different suit. This is a suit to declare and enforce a lien for a fee for services rendered in a certain suit, on property which was received as a result of that suit. The controversy over the \$152, being about an entirely different matter, is in no way germane to this issue, and should not have been considered, and judgment for said sum was improper in this proceeding.

The decree is therefore reversed, and the cause remanded, with instructions to enter a decree for Webber in the sum of \$1,000, with interest at six per cent per annum from the date of the acquisition of the property by Davis, and to proceed to enforce the lien on the property mentioned in the complaint, and for such other proceedings as may be necessary, not inconsistent with this opinion. The costs of this court will be paid by appellee; the cost below will stand as adjudged by the chancellor.

Bunn, C. J., dissenting.

IN THE CASE of De Graffenreid v. St. Louis etc. Ry. Co., 66 Ark. 260, it was decided, on the authority of the principal case, that a contract between attorney and client, whereby the latter conveys to the former a half interest in any judgment he may recover in a certain suit, does not convey any interest in the client's cause of action nor confer upon the attorney power to question the good faith of any settlement or compromise which the client may make of the litigation before judgment is recovered.

CHAMPERTY.—An agreement that an attorney is to receive, as compensation for his services, a portion of the subject matter of litigation, is not champertous: *Duke v. Harper*, 66 Mo. 51, 27 Am. Rep. 314. Compare *Stanton v. Haskins*, 1 McAr. 558, 29 Am. Rep. 612; *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401. Cham-

erty and maintenance are the subject of the monographic note to *Thalhimer v. Brinckerhoff*, 15 Am. Dec. 316-322.

ATTORNEY AND CLIENT—FEE UNDER A VOID CONTRACT. A counsel does not forfeit his right to full compensation by entering into a contract unenforceable because champertous: *Rust v. Larue*, 4 Litt. 412, 14 Am. Dec. 172.

ATTORNEY AND CLIENT—COMPENSATION. HOW DETERMINED.—If a client dismisses a suit without the consent of his attorney, the latter may recover, on a quantum meruit, the reasonable value of his services: *Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613. In ascertaining the amount of a fee, the importance and results of a case in which an attorney is engaged, as well as the actual time consumed in the conduct of the suit, must be considered: *Selover v. Bryant*, 54 Minn. 434, 40 Am. St. Rep. 349; *Babbitt v. Bumpus*, 73 Mich. 331, 16 Am. St. Rep. 585; and see note thereto on the general subject.

ATTORNEY'S LIEN—EXTENT OF.—An attorney has no general lien upon an uncollected judgment for services in other suits, but only a particular lien for his costs and compensation in that particular case: Monographic note to *Hanna v. Island Coal Co.*, 51 Am. St. Rep. 257, 259. See this note, pages 251-281, for an excellent discussion of attorneys' liens.

ATTORNEY'S LIEN.—SATISFACTION OF A JUDGMENT between the parties cannot prejudice the lien of the attorney for services rendered in procuring the judgment: Note to *Hanna v. Island Coal Co.*, 51 Am. St. Rep. 262.

ATTORNEY AND CLIENT.—AN AGREEMENT NOT TO COMPROMISE an action, made by a client with his attorney, is not binding on the former: Note to *Hanna v. Island Coal Co.*, 51 Am. St. Rep. 262.

WILLIAMSON v. LAZARUS.

[66 ARKANSAS, 226.]

CONVEYANCES—CURATIVE ACTS.—A conveyance of a homestead, invalid because defectively acknowledged by the wife, is made valid by a statute, subsequently enacted, providing that conveyances, "the proof of execution whereof is insufficient, because the officer certifying such execution omitted any words in his certificate, or is otherwise informal, shall be as valid and binding as though the certificate of acknowledgment of proof of execution was in due form."

Collins & Lake and Steel & Steel, for the appellants.

J. D. Shaver, for the appellee.

²²⁸ **RIDDICK, J.** The land in controversy here was at one time the homestead of R. H. Flanagin. Flanagin sold it to Cohen, and his wife joined in the execution of the deed. The deed purports to convey an estate in fee simple to Cohen, but was invalid by reason of a defect in the acknowledgment. It

does not show that the wife acknowledged the execution of the deed, but only that she had signed and sealed the relinquishment of dower. This deed was recorded before the passage of the curative act of March 11, 1891, and the only question here is whether it was affected by such act. The act provides that "all conveyances and other instruments of writing which have heretofore been recorded in any county in this state the proof of execution whereof is insufficient because the officer certifying such execution omitted any words in his certificate, . . . or is otherwise informal, shall be as valid and binding as though the certificate of acknowledgment or proof of execution was in due form." Appellants contend that this deed is void for failure to comply with the law in reference to conveyances of homesteads. They say that it is regular on its face; that there is no defect or informality apparent; and that the curative act above quoted does not apply. But this argument is in conflict with the decision of this court in *Johnson v. Parker*, 51 Ark. 419. That case was decided by a divided court, but after full discussion. It construed a statute from which the act in question here was afterward copied, and is, we think, decisive of this case. "The application of the statute," said Chief Justice Cockrill in that case, "has heretofore been made only to obvious omissions of words from the certificate of acknowledgment, and particular instances of this nature may have given rise to the legislation in question; but the terms employed are comprehensive, and enunciate a general rule applicable to all cases in which the acknowledgment is insufficient to give full legal effect to the ²²⁰ terms of the conveyance." The terms of the deed from Flanagan and wife to Cohen, if given full legal effect, would vest in Cohen an estate in fee to the lands in question. The obvious intent of the parties, as shown by the deed, in the granting clause of which the wife joined, was to convey such an estate. The only reason why it failed to invest in Cohen all and every interest in the land held either by Flanagan or his wife was an insufficiency in the proof of execution through the omission of certain words from the acknowledgment. But this defect was cured by the statute, and the conveyance was thus made effectual. The circuit court was right in holding the deed to be valid, and, this being the only error complained of, the judgment is affirmed.

ACKNOWLEDGMENTS — CURATIVE STATUTES. — An acknowledgment of a release omitting to state that the wife was sepa-

rately examined is made good by subsequent statute: *Tate v. Stooltzfoos*, 16 Serg. & R. 35, 16 Am. Dec. 546, and note; note to *Barnet v. Barnet*, 16 Am. Dec. 518-520. Compare *Grove v. Todd*, 41 Md. 633, 20 Am. Rep. 77. See, also, *Finlayson v. Peterson*, 5 N. Dak. 587, 57 Am. St. Rep. 584, and note.

BAKER v. ALLEN.

[66 ARKANSAS, 271.]

WATER AND WATERCOURSES—SURFACE WATER—LIABILITY FOR OBSTRUCTING.—The right of a landowner to obstruct the natural drainage or flow of surface water is not absolute, and he is liable when he unnecessarily injures the land of upper proprietors by the erection of an embankment or levee, when by reasonable care and expense he might have avoided such injury.

WATER AND WATERCOURSES—OBSTRUCTION OF SURFACE WATER—LANDLORD AND TENANT.—During the time that a tenant is in exclusive possession of premises, the landlord is not liable for the act of the former in obstructing the natural flow of surface water to the injury of an upper proprietor, if such landlord neither licensed nor consented to such obstruction.

WATER AND WATERCOURSES—OBSTRUCTING SURFACE WATER—PROSPECTIVE DAMAGES.—A levee composed of earth, less than two feet high, and only a few inches thick, is not such an obstruction to the natural flow of surface water as will work a permanent injury to the land of an upper proprietor and justify an award of prospective damages.

O. W. Scarborough and Phillips & Campbell, for the appellant.

E. Baxter and C. Coffin, for the appellee.

275 RIDDICK, J. This is an action to recover damages for the obstruction of the natural flow of surface water, caused by the construction of a levee across a swale or depression which extended across the lands of both plaintiff and defendant, and along which the surface water passed in times of rain and melting snow. These lands, at rare intervals, were subject to overflow from White river, but it was not shown that the levee caused injury by holding back the flood waters which came from the river. The injury, if any, arose from the obstruction of ordinary surface water only.

At the common law, each proprietor had the right to protect his land against surface water flowing upon his soil, and, under the strict rules of that law, plaintiff would have no right of action. But this court, after what seems to have been a full consideration of the question, adopted a rule materially different

from that of the common law. In the case of *Little Rock etc. Ry. Co. v. Chapman*, 39 Ark. 463, 43 Am. Rep. 280, it held that the right of a landowner to obstruct the natural drainage or flow of surface waters was not absolute, and that if such proprietor unnecessarily injure the land of upper proprietors by the erection of an embankment or levee, when by reasonable care and expense he might have avoided the injury, he becomes liable for damages thus occasioned. The rule, as declared by this court, is similar to that followed by the courts of several of the states. Speaking of this question, Judge Dillon, of the supreme court of Iowa, said: "We recognize the fact, to use Lord Tenderden's expression, that surface water or slough water is a common enemy which each landowner may reasonably get rid of in the best manner possible; but, in relieving himself, he must respect the rights of his neighbor, and cannot be justified by an act having the direct tendency and effect to make that enemy less dangerous to himself and more dangerous to his neighbor. He cannot make his estate more valuable by an act which unnecessarily renders his neighbor's less valuable": *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563.

The instructions given by the circuit judge in this case do not state the law correctly, for they are to the effect that the defendant had no right, under any circumstances, to obstruct "a natural flow or drainage of water." There is no pretense or ²⁷⁰ claim here that the defendant obstructed a stream or water-course. The levee was constructed across a slight but broad depression, along which the surface water was drained from lands of upper proprietors. But the court, in the third instruction, told the jury that "if the evidence in the case shows to the satisfaction of the jury that there was a natural flow and drainage of water accumulating by rainfall or otherwise from the surrounding country, by which the water in its natural flow was carried off from the lands of the plaintiff across the lands of the defendant, and that, by the erection of the embankment complained of, the flow was prevented, and land of the plaintiff caused to be overflowed, then the defendant would be responsible in damages to the plaintiff, to the extent of the injury caused thereby to his property." This instruction seems to have been copied from one given by the circuit judge in case of *Little Rock etc. Ry. Co. v. Chapman*, 39 Ark. 463, 43 Am. Rep. 280. But this court said in that case that, in order to recover, the obstruction must be shown to have been unnecessary, and called attention to the defect in the instruction. It, however,

affirmed the judgment, for the reason that there was in that case a special finding that the obstruction was unnecessary. Now, under the rule established in that case, if the landowner, by the use of a ditch or drain, instead of a levee, could protect his own land from water, and avoid injury to the adjoining proprietor, he should do so. But he would not be required to go to an unreasonable expense to protect the lands of the adjoining proprietor, and would not be liable for damages occasioned by holding back surface water if such levee was the only practical method of protecting his lands from such surface water: *Little Rock etc. Ry. Co. v. Chapman*, 39 Ark. 463, 43 Am. Rep. 280. This third instruction seems also in conflict with the seventh and eighth instructions, which were too favorable to defendant. Neither of these instructions stated the law correctly, and, taken together, tended to confuse and mislead the jury.

The landlord's right to possession being usually suspended during the term of the lease, his liabilities in respect to the possession are, as a general rule, suspended as soon as the tenant takes possession. It follows that, for a nuisance committed by the tenant during his term, the landlord, as a general ²⁷⁷ rule, is not liable; for he has no legal means of abating the nuisance. He cannot interfere with the possession of the tenant for that purpose, but, when the term expires, he has then the right of entry and power to abate the nuisance, and, if he fails to do so, his liability commences: *Ingwersen v. Rankin*, 47 N. J. L. 18, 54 Am. Rep. 109.

We are therefore of the opinion that the judge should, as requested by defendant, have told the jury that if the defendant had rented his land to Busby during the year 1894, and had neither possession nor control over the same, he would not be responsible for the act of his tenant in closing the cut in the levee if he neither licensed nor consented to said act. If Busby was the agent or manager of defendant, and acting for him, the defendant would, of course, be responsible for his acts done within the scope of his agency. But if Busby had rented the land during 1894, and had exclusive possession and control over same, defendant would not be liable for his act in closing the levee, unless he advised or licensed the same, or unless he afterward renewed the lease or granted another lease with the levee in such condition: 2 Wood on Landlord and Tenant, 2d ed., sec. 526; 1 Taylor on Landlord and Tenant, 8th ed., sec. 175; *Haizlip v. Rosenberg*, 63 Ark. 430.

The levee complained of in this case was composed of dirt,

and less than two feet high, and only a few feet thick. It could easily be cut and opened so as to allow the passage of water. It was not a part of a railroad bed or other permanent structure. It had been cut and opened for the passage of water, and so remained for several years until 1894. It was closed by the tenant who occupied the place for that year, to protect the land from surface water during that year. When we consider the ease with which this small embankment could be opened or closed, and also the purpose of the tenant in closing the same, it seems clear that the act of such tenant did not constitute a permanent injury to plaintiff's land. The opposite view might make the defendant liable for large sums in the way of prospective damages, even though there was no intention to permanently close the levee, and though he should wish to remove the obstruction and obviate the injury. As the levee could easily be opened, and such prospective injury avoided, it would ²⁷⁸ be unjust, as well as unreasonable, under such circumstances, to presume conclusively that the nuisance would be continued, and the injury made permanent: *Mitchell v. Darley Main Colliery Co.*, L. R. 14 Q. B. Div. 125; *Uline v. New York etc. R. R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661.

We think, therefore, as the complaint alleges the levee to have been erected in 1894, and, as this action was commenced in that year, the recovery must be limited to such damages as accrued up to the bringing of the action. We are therefore of the opinion that the court erred in his instruction defining the measure of damages. For the errors indicated, the judgment is reversed, and a new trial granted.

As the appellant did not set out the instructions of the court in his abstract, as required by the rule of this court, no costs will be taxed for such briefs.

Chief Justice Bunn and Mr. Justice Battle concur in the judgment of reversal.

WATERS AND WATERCOURSES—SURFACE WATERS.—The owner of the higher of two adjoining tenements has an easement to have all waters falling or accumulating on his land discharged over the lower tenement, to the same extent as they would be discharged in a state of nature: *Gray v. McWilliams*, 98 Cal. 157, 35 Am. St. Rep. 163, and note. The rule that surface water is a common enemy, and that an owner may defend his premises against it by dike or embankment, without liability to an adjoining owner, is subject to the qualification that every proprietor must so use his property as not unnecessarily nor negligently to injure his neighbor: *Beatrice v. Leary*, 45 Neb. 149, 50 Am. St. Rep. 546. Compare *Missouri Pac. Ry. Co. v. Keys*, 55 Kan. 205, 49 Am. St. Rep. 249; *Cass v. Dicks*, 14 Wash. 75, 53 Am. St. Rep. 859, and note.

LANDLORD AND TENANT—NUISANCE.—If a tenant creates a nuisance without the authority of the landlord, the latter is not liable: *Lufkin v. Zane*, 157 Mass. 117, 34 Am. St. Rep. 262, and note. A landlord is not liable for a new nuisance created by the tenant during his term: Note to *Leonard v. Storer*, 15 Am. Rep. 79.

ROULSTON v. HALL.

[66 ARKANSAS, 305.]

JUDGMENTS—EFFECT AS EVIDENCE AGAINST STRANGER.—A decree of divorce is not admissible in evidence against a stranger to it, to show that the property in controversy is a homestead.

HUSBAND AND WIFE—ESTATES BY ENTIRETY.—If land is conveyed to a husband and wife, they take an estate by entirety, not subject to dower.

HUSBAND AND WIFE—TENANTS BY ENTIRETY—RIGHT OF EITHER TO CONVEY.—A husband or wife, as tenants of land by entirety, cannot convey his or her interest so as to affect the right of survivorship in the other.

DIVORCE—TENANCY BY ENTIRETY.—In case of divorce between husband and wife holding land as tenants by entirety, she is entitled to receive one-half of the rents of such land so long as both live, and, upon the death of either, the entire property goes to the survivor.

Z. T. Roulston, pro se, for the appellant.

Wood & Henderson, for the appellee.

307 HUGHES, J. The contention of the appellant is that the judgment of the court should have been for him for an undivided one-half interest in the property, as prayed for, and for one hundred and one dollars and twenty-five cents rent, as per verdict of the jury. Appellee, as we understand, contends that the land was a homestead, and that Ben Hall, while her husband, conveyed the land to appellant, and that she did not join in the conveyance, which is therefore void, and that, if not entitled to hold the property as a homestead, the court correctly decreed her one-third interest for her natural life in the half of said property adjudged to appellant, less said one-third so decreed to her in lieu of alimony. There was no competent evidence that the property was a homestead. The decree of the chancery court of Garland county in case of *Addie Hall v. Ben Hall* for divorce was relied upon only to show that it was a homestead. Roulston, the appellant, was not a party to that suit, and the question whether the property was a

homestead was never adjudicated in that case as to him, and Roulston, the appellant, is not bound by that decree. That decree was not evidence in this case that said property was a homestead, and the court below did not find that it was a homestead. "A judgment is evidence of nothing, in a subsequent action between different parties, except that it had been rendered": *Thomas v. Hinkle*, 35 Ark. 450.

The lot having been conveyed to Ben Hall and Addie Hall, husband and wife, they took it as an estate by entirety, and it was never subject to dower. If one dies, the other takes the whole: *Robinson v. Eagle*, 29 Ark. 202. The wife's right to dower is inchoate till her husband dies, and at his death, in case of an estate by entirety, she takes, not dower, but all. "Dower will not be carved out of an estate held in joint tenancy; seisin in severalty is necessary to support it": *Cockrill v. Armstrong*, 31 Ark. 580. And this is true as to an estate by entirety.

We suppose the court below gave the appellee the decree for one-third interest for her natural life in the appellant's half of said property, because it was adjudged to her in the suit of *Addie Hall v. Benjamin Hall* in the Garland chancery court. And we suppose that the learned chancellor in that case awarded it to her under section 2517 of Sandel and Hill's Digest, where it is provided that "in every final judgment for divorce from the bonds of matrimony granted to the wife against the husband, [the wife] shall be entitled to one-third part of the husband's personal property absolutely, and one-third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage for her life, unless the same shall have been so relinquished by her in legal form." But the husband, Ben Hall, had not an estate of inheritance in these lots. Where land is conveyed to husband and wife, they do not take by moieties, but both are seised of the entirety—the whole in contradistinction to a moiety or part only: *Robinson v. Eagle*, 29 Ark. 202; 2 Kent's Commentaries, 132; 4 Kent's Commentaries, 414. They are called tenants by entirety. Estates by entirety are sometimes spoken of as joint tenancies, but not with strict accuracy. Like a joint tenancy, they possess the quality of survivorship. Husband and wife are but one person in law, and a conveyance to husband and wife is, in legal contemplation, a conveyance but to one person: *Shaw v. Hearsey*, 5 Mass. 521; *Dias v. Glover*, Hoff. Ch. 71; *Doe v.*

Garrison, 1 Dana, 35; Gibson v. Zimmerman, 12 Mo. 385, 51 Am. Dec. 168; Boone's Law of Real Property, sec. 365.

The rule of the common law that a conveyance to husband and wife constitutes them tenants by the entirety—the survivor taking the whole estate—is not changed by the abolition of joint tenancies, nor by the act of the legislature enabling married women to acquire and hold property separate from their husbands: ³⁰⁹ See Marburg v. Cole, 49 Md. 402, 33 Am. Rep. 266; Diver v. Diver, 56 Pa. St. 106; Jones v. Chandler, 40 Ind. 588; McDuff v. Beauchamp, 50 Miss. 531; Garner v. Jones, 52 Mo. 68; McCurdy v. Canning, 64 Pa. St. 39; Bennett v. Child, 19 Wis. 362, 88 Am. Dec. 692; Hulett v. Inlow, 57 Ind. 412, 26 Am. Rep. 64; In re Shaver, 31 U. C. Q. B. 605; Robinson v. Eagle, 29 Ark. 202.

Neither tenant by entirety can convey his or her interest so as to effect the right of survivorship in the other. The alienation by the husband of a moiety will not defeat the wife's title to that moiety if she survive him; but, if he survive, the conveyance becomes as effective to pass the whole estate as it would had he been sole seised at the time of the conveyance. The husband may do what he pleases with the rents and profits during coverture, but he cannot dispose of any part of the inheritance without his wife's consent: Boone's Law of Real Property, sec. 366, and cases cited. An estate of inheritance is "a species of freehold estate in land, otherwise called a 'fee,' where the tenant is not only entitled to enjoy the land for his own life, but where, after his death, it is cast by the law upon the persons who successfully represent him in perpetuum in right of blood, according to a certain established order of descent": 1 Stephen's Commentaries, 218; Coke on Littleton, sec. 51; Black's Law Dictionary, 436, "Estate of Inheritance." From these definitions it seems that an estate held by entirety cannot be an estate of inheritance.

It follows, from what has been said, that the court erred in giving judgment for appellee for one-half of said property, and for one-third of the other, as during the lifetime of her husband she was only entitled to the rents of one-half, but in case of the death of the husband to the whole. The husband was entitled to one-half the rents, until the death of his wife, in which event he would be entitled to the whole estate. His vendee, therefore, is entitled to one-half the rents while the wife of his vendor lives.

Reversed and remanded for a new trial.

A DECREE OF DIVORCE IS NOT EVIDENCE in another suit, except in a case in which the same parties, or their privies, are litigating in regard to the same subject of controversy: *Belknap v. Stewart*, 38 Neb. 304, 41 Am. St. Rep. 729, and note.

HUSBAND AND WIFE.—TENANCY BY ENTIRETY is to be presumed when the grantees are husband and wife, unless from the language of the deed it is manifest that a different purpose was intended: *Thornberg v. Wiggins*, 135 Ind. 178, 41 Am. St. Rep. 422, and note; and neither of them, without the consent of the other, can dispose of any part of the estate so as to affect the right of survivorship of the other: *Hiles v. Fisher*, 144 N. Y. 306, 43 Am. St. Rep. 762, and note. Contra, *Donegan v. Donegan*, 103 Ala. 488, 49 Am. St. Rep. 53; *Robinson*, Appellant, 88 Me. 17, 51 Am. St. Rep. 367.

DIVORCE—TENANCY BY ENTIRETY.—Under a joint deed to a husband and wife, they take by entireties, and the estate thus created, with the right of survivorship, is not destroyed nor affected by divorce of the grantees: *Appeal of Lewis*, 85 Mich. 340, 24 Am. St. Rep. 94. Contra, *Hopson v. Fowikes*, 92 Tenn. 697, 36 Am. St. Rep. 120, and note.

WHITE SEWING MACHINE COMPANY v. WOOSTER.

[66 ARKANSAS, 382.]

HOMESTEADS IN ESTATES BY CURTESY.—The possessory interest of a tenant by the curtesy consummate is sufficient to support a claim of homestead.

HOMESTEADS—CONVEYANCE TO CHILDREN—RIGHTS OF CREDITORS.—A surviving husband, having a homestead in an estate by the curtesy, may convey such estate to his children without interference by his creditors.

HOMESTEADS—SALE—CLOUD ON TITLE.—A sale of a homestead, under execution by the creditors of the homesteader creates a cloud upon the title, which may be removed in equity.

HOMESTEADS—WHEN NOT LOST.—If the association of persons constituting the family is broken up, whether by separation or death of some of the members thereof, or coming of age of the children, the right of the homestead continues in the former head of the family, provided he still resides at his old home, and continues to occupy it as his homestead.

HOMESTEADS.—LEASE OF a homestead does not necessarily constitute an abandonment thereof.

J. G. B. Simms, for the appellant.

S. Frauenthal, for the appellees.

BUNN, C. J. This is a bill in the Faulkner chancery court by the appellees against the appellant company to remove a cloud upon plaintiff's title to lots Nos. 11, 12, 23, and 24 in block 26 of Robinson's plan of the town of Conway, Faulkner county, Arkansas. Decree for plaintiffs, and the defendant appealed to this court.

Narcissa Wooster departed this life on the 25th of October, 1896, leaving surviving her her husband, J. P. Wooster, Sr., and her and his children, J. P. Wooster, Jr., aged twenty-seven or twenty-eight years, Mrs. Mary Ellen Gellenwater, aged twenty-five years, and Mrs. ³⁸⁴ Annie L. Tate, aged twenty-two years, and seised of the lots above named. For many years she had been afflicted with rheumatism, and had, in company with her husband, made three several visits to Hot Springs in this state, seeking relief from the waters of that place, making a considerable stay on each visit, the first of which was before they settled upon the lots in controversy and occupied them and the buildings thereon as their homestead, which was in 1888. On the last visit, it became apparent that their stay would be indefinitely prolonged, and they leased their homestead to one Hardin for one year, beginning the 7th of August, 1896, and expiring the 7th of August, 1897. From their entrance upon the premises, the wife and husband continued to claim the same as their homestead, neither of them having any other homestead, and never were absent from the same, except as stated, and therefore, never abandoned the same, nor did any act amounting to an abandonment. The wife, the owner of the fee in the homestead, died in October, 1896, and their said children were all then of age, and said lease had not then expired; and the husband and father, then the tenant by the curtesy and otherwise entitled to the possession, was thus prevented from resuming the possession, and was in fact still further delayed in taking possession by the extreme illness of the lessee, Hardin, after the expiration of the lease.

Soon after the death of Mrs. Wooster, the defendant company, having previously obtained a judgment against J. P. Wooster, Sr., caused execution to be issued and levied upon his life estate in the land in controversy, and on the 2d of January, 1897, the same was sold thereunder to the defendant company, and the sheriff gave to it his certificate of sale and purchase, and this certificate constitutes the alleged cloud upon plaintiff's title.

The plaintiffs are the owners of the fee by inheritance from their mother, the said Narcissa, and two of them of the possessory right of their father by purchase from him as evidenced by deed dated December, 1896, about two months after the death of the mother, but after the levy of the execution of defendant, as stated above. The consideration of the deed from the father to the two children, as testified by him, was four hun-

dred dollars, ³⁸⁵ which he owed them, the amount stated in the deed, and the further consideration that he was to be permitted to share the use and occupation of the home with them.

The father and husband sought in every proper way to assert his homestead claim against the execution of defendant, but all his efforts to obtain a supersedeas against it were of no avail, and he seems to have given up the contest in despair.

The husband, during the lifetime of his wife, had but an inchoate right in the property, subject to be defeated by the survival of the wife, and to become consummate, in case of her death before his. He had, however, independent of this, a joint homestead right with his wife (she assenting, as appears to have been the case), growing out of his marital relations with her, as against the rest of the world: *Orr v. Shraft*, 22 Mich. 260; *Buck v. Lee*, 36 Ark. 525.

After her death, he, being the tenant by the curtesy, owned a life estate in the property, and had possession through his tenant, Hardin, and was entitled to claim his interest as exempt from execution as his homestead, since almost any possessory interest will support a homestead claim: *Rockafellow v. Peay*, 40 Ark. 69; *Sims v. Thompson*, 39 Ark. 301; *Ward v. Mayfield*, 41 Ark. 94; *Robson v. Hough*, 56 Ark. 621; *Thompson v. King*, 54 Ark. 9. It is held in *Thompson v. King*, 54 Ark. 9, that the tenancy by the curtesy must yield to the right of homestead in the minor children, but in this case, where the life tenancy attached on the death of the wife, there were no minor children to claim in opposition to the tenant by the curtesy.

The husband continued, in every proper way, to assert his homestead right from the time he and his wife and family began to occupy it as such in 1888, jointly with her until her death, and afterward until sold to his children, and even after that, doubtless to preserve his reservation testified to by him. If this property constituted his homestead from the beginning, he being then a citizen of the state, a married man and the head of a family, and he continued to assert his claim to it as a homestead on all proper occasions and in every proper way, as he appears to have done, and had never abandoned it, as appears to be the case, until the sale to his children as aforesaid, he had ³⁸⁶ a right to claim it as exempt from the payment of his debts, and therefore to convey to his children, without let or hindrance from his creditors. In such case, moreover, there was nothing left in him upon which the execution could be levied, and the sale carried nothing with it. But the sale under the

execution was in so far voidable only as to create a cloud upon the title of plaintiff.

In *Stanley v. Snyder*, 43 Ark. 429, this court said: "The constitution, which contains our homestead law, has not, in express terms, anticipated and provided for every possible phase of the question. It therefore devolves upon the courts to construe and apply the law to new cases as they arise. Interpreting the law according to its spirit, and following the current adjudications, we hold, though with some hesitation, that when the association of persons which constitute the family is broken up, whether by separation or the death of some of the members, the right of homestead continues in the former head of the family, provided he still resides at his old home."

Now in the case at bar, J. P. Wooster, Sr., was the former head of the family—that is, the head of the family before the wife died, and the children had reached their majority and separated from the family, if, in fact, there was ever any such separation. He was also in possession at the death of his wife, through their tenant, Hardin, whose lease had not then expired, and he still had title sufficient to support a homestead claim, and the doctrine of *Stanley v. Snyder*, 43 Ark. 429—once a homestead always a homestead, as long as occupied and claimed as such—we think, applied to him; and it follows that his children, purchasing from him, took free from the claims of their father's creditors, and were entitled to the relief asked.

The decree is affirmed.

Wood, J., dissenting.

HOMESTEADS.—A TENANT BY THE CURTESY, having a life estate subject to levy and sale under execution, is an "owner" of land within the meaning of a statute allowing to "owners" a homestead: Monographic note to *Pryor v. Stone*, 70 Am. Dec. 344.

HOMESTEADS—FRAUDULENT CONVEYANCES.—There can be no fraudulent alienation of homestead property: *Roberts v. Robinson*, 49 Neb. 717, 59 Am. St. Rep. 567, and note. A husband's conveyance of an exempt homestead to his wife is not fraudulent as to his creditors: *Pike v. Miles*, 23 Wis. 164, 99 Am. Dec. 148.

HOMESTEADS—LEASE OF.—Homestead rights may exist in land leased or sold under contract, where the legal title remains in the vendor: *Anderson v. Cosman*, 103 Iowa, 266, 64 Am. St. Rep. 177. Compare note to *Goff v. Jones*, 8 Am. St. Rep. 623.

HOMESTEAD—WHEN NOT LOST.—A homestead right, once acquired by a man as head of a family, is not lost by the subsequent death, marriage, or removal of all the family but himself: *Kessler v. Draub*, 52 Tex. 575, 36 Am. Rep. 727, and note; *Stults v. Sale*, 92 Ky. 5, 36 Am. St. Rep. 575, and note.

ACRUMEN v. BARNES.

[66 ARKANSAS, 442.]

HOMESTEADS—EXEMPTION OF INSURANCE MONEY.—If money is loaned with which to purchase a homestead and so used, and a mortgage given to the lender to secure its repayment, insurance money due on a building constituting part of the homestead is not exempt, in favor of the borrower, from seizure on process of garnishment or execution for the mortgage debt due the lender.

HOMESTEADS — PURCHASE MONEY — BORROWED MONEY.—Money borrowed of a third person with which to purchase a homestead, when it is understood between the lender and borrower that it is to be used for that purpose, and it is so used, is purchase money, and the homestead is liable therefor.

R. C. Fuller, and Thornton & Thornton, for the appellant.

W. S. Amis, for the appellee.

444 HUGHES, J. Where money is loaned with which to purchase a homestead, upon the understanding that it will be so used, and it is so used, and a mortgage is given to the lender to secure the payment of the money loaned for that purpose, if the building constituting a part of the homestead is insured for the benefit of the owner of the homestead, and afterward is consumed by fire, is the money due on the policy of insurance exempt from seizure on process of garnishment or execution for the debt due the lender?

Article 9, section 3, of the constitution of 1874, provides that "the homestead of any resident of this state, who is married or the head of a family, shall not be subject to the lien of any judgment or decree of any court or to sale under execution or other process thereon, except such as may be rendered for the purchase money or for specific liens." Acruman's testimony shows that he loaned the money to Barnes to be used for the purchase of the homestead property, and Barnes swears he used it for that purpose. Barnes executed a mortgage to Acruman upon the same property to secure the payment of the money loaned with which to purchase it. In some courts it is held that money loaned to purchase property cannot be considered purchase money as between the lender and borrower, but only between the vendor and purchaser of the property: *Heusler v. Nickum*, 38 Md. 270. But, in our opinion, the weight of authority and the better reason is that money borrowed of a third person with which to purchase a homestead, when it is understood between the lender and the borrower that it is to be used for that purpose, and it is so used, is purchase money: *Allen v.*

Hawley, 66 Ill. 164; Hamrick v. People's Bank, 54 Ga. 502; Carr v. Caldwell, 10 Cal. 385, 70 Am. Dec. 740; Nichols v. Overacker, 16 Kan. 54. "Things bought with borrowed money, borrowed with the avowed purpose of buying them, are not exempt as against the lender": Waples on Homesteads and Exemptions, 911; Houlehan v. Rassler, 73 Wis. 557. "The homestead is liable for money borrowed to pay a balance due on the purchase price": White v. Wheelan, 71 Ga. 533; Middlebrooks v. Warren, 59 Ga. 232. "One who loans money to enable another to purchase a homestead cannot be defeated in collecting it by the claim of homestead immunity upon the ⁴⁴⁵ part of the borrower": Warhmund v. Merritt, 60 Tex. 24; Eylar v. Eylar, 60 Tex. 315.

The insurance money due the appellee in this case was not exempt from the debt due the appellant for the thousand dollars loaned him by the appellant with which to purchase the homestead, for the loss of which the insurance money was due the appellee. The money loaned, under the circumstances, was purchase money, according to the authorities. Wherefore the decree of the chancellor holding that the money is exempt is erroneous.

The judgment is reversed, with directions to enter a judgment for the appellant.

HOMESTEADS—PURCHASE MONEY.—Money borrowed to purchase land is not purchase money within the meaning of a statute declaring that the homestead right shall not be claimed against a debt due for the purchase money: Eyster v. Hatheway, 50 Ill. 521, 99 Am. Dec. 537. This is true in the absence of an understanding with the lender that the borrowed money is to be used in the purchase of a homestead: Dreese v. Myers, 52 Kan. 126, 39 Am. St. Rep. 336. Compare Magee v. Magee, 51 Ill. 500, 99 Am. Dec. 571, and extended note.

HOMESTEADS.—INSURANCE MONEY due upon a policy issued on a homestead is not subject to garnishment at the suit of a creditor: Chase v. Swayne, 88 Tex. 218, 53 Am. St. Rep. 742, and note.

STATE v. SLOAN.

[66 ARKANSAS, 575.]

CONSTITUTIONAL LAW—NECESSARY EXPENSES OF GOVERNMENT.—Power delegated by the constitution to the legislature to appropriate money to defray the necessary expenses of government carries with it the right to determine what is a necessary expense.

CONSTITUTIONAL LAW—ENACTMENT OF STATUTE—NECESSARY EXPENSE OF GOVERNMENT.—If a statute making an appropriation for building a state capitol receives a mere majority of the votes of both houses of the legislature, and the presiding officers thereof decide that the statute has received the majority necessary to its passage, and no appeal is taken from that decision, it must be presumed that the legislature has ratified the acts of its officers, thereby declaring that the statute is constitutionally passed, and that the building of such state capitol is a necessary expense of government.

CONSTITUTIONAL LAW—TITLE OF ACT—UNITY OF SUBJECT—APPROPRIATIONS.—Under a constitutional provision that no statute shall relate to more than one subject, which must be expressed in its title, the unity of the subject of an appropriation bill or statute is not broken by appropriating several sums for specific objects, which are necessary or convenient, or tend to the accomplishment of one general design, notwithstanding other purposes than the main design may be thereby subserved.

CONSTITUTIONAL LAW—APPROPRIATION STATUTE—UNITY OF SUBJECT.—A statute authorizing the building of a state capitol upon the ground now occupied by the state penitentiary, and making an appropriation therefor, and also authorizing the penitentiary board to procure new grounds and build a new penitentiary, and to pay therefor out of the fund at its disposal at the time the statute is passed, is valid, and not unconstitutional as embracing two subjects of appropriations in one statute.

J. Davis, attorney general, and C. Jacobson, for the appellant.

T. M. Mehaffy, J. D. Shackleford, and Carmichael & Seawel, for the appellees.

577 **BATTLE, J.** This action involves the constitutionality of an act of the general assembly entitled, "An act to provide for the erection of a new state capitol," approved April 17, 1899. For the purpose of erecting and completing a new state capitol building for the state of Arkansas at the city of Little Rock, in this state, this act provides for the appointment and organization of a board to be known as the "board of state capitol commissioners," and, among other things, makes it their duty, as soon as practicable, to secure a suitable set of plans and specifications for the capitol building to be erected; and provides that the building shall be so planned that suitable quar-

ters for all departments of the state government will be provided for in the best possible manner, and shall be fireproof and constructed of granite, brick, and iron, and shall have a roof of either slate or sheet metal, and shall be provided with proper heating, lighting, and ventilating apparatus and with the most modern sanitary arrangements; and that the reasonable cost of the building shall not exceed one million dollars. The act further provides that the board shall acquire, in the manner most economical and most desirable to the state, a piece of land suitable to the manufacture of brick and a granite quarry or a piece of granite land upon which a desirable quarry can be opened; and that the board shall appoint a superintendent of the granite quarry, who shall be a competent and experienced quarryman and shall have a thorough knowledge of stone cutting; and makes it the duty of the state penitentiary board to "turn over" to the board of state capitol commissioners such number of convicts as can be advantageously worked upon the construction of the capitol building and the manufacture of brick and the quarrying and cutting of stone therefor, not exceeding two hundred in number. The act then makes the provisions contained in sections 11 and 12 of the act, which are as follows:

578 "Sec. 11. That, for the purpose of carrying out the provisions of this act for the employment of an architect, superintendence, the purchase of tools, machinery, lands for the manufacture of brick, and quarrying of stone, or leases thereof, and for the transportation of materials, and other purposes necessary to the carrying out of the provisions of this act, there is hereby appropriated the sum of fifty thousand (\$50,000) dollars out of any moneys in the state treasury which may arise from the sale of lands, except school lands, belonging to the state for the two (2) years commencing on the first day of April, 1899, and ending on the thirty-first day of March, 1901, and also all fees paid to the commissioner of state lands, and also the net proceeds of the labor of the state convicts during the same period.

"Sec. 12. The new statehouse shall be located on the present penitentiary grounds of the state. The board of penitentiary commissioners is hereby invested with authority to abandon the present penitentiary grounds of the state, to turn the same over to the statehouse board for the purposes provided in this act. The penitentiary board is authorized to procure new grounds at such place as they may select in Pulaski county; cause new

buildings and walls to be constructed for use as a penitentiary, the expenses thereof to be paid out of the fund now at the disposal of said penitentiary board": Acts 1899, p. 212.

It is contended, in behalf of the state, that the act is unconstitutional for two reasons: 1. Because the building of a new state capitol is not a necessary expense of government, and the act was not passed by a majority of two-thirds of both houses of the general assembly; and 2. Because the act embraces more than one subject of appropriation. The sections of the constitution of which it is said to be in violation are as follows: "No state tax shall be allowed, or appropriation of money made, except to raise means for the payment of the just debts of the state, for defraying the necessary expense of government, to sustain common schools, to repel invasion and suppress insurrection, except by a majority of two-thirds of both houses of the general assembly." "The general appropriation bill shall embrace nothing but appropriations for the ordinary expense of the executive, legislative, and judicial departments ⁵⁷⁹ of the state. All other appropriations shall be made by separate bills, each embracing but one subject": Const., art. 5, secs. 30, 31.

1. There is nothing in the constitution of this state defining what is a necessary expense of government, or denying or limiting the right of the legislature to determine the question. On the contrary, the right is impliedly delegated to it; for the power to appropriate money to defray the necessary expenses of government carries with it the right to determine what is a necessary expense. Upon this principle, local and special laws have been upheld by this court, notwithstanding the constitution denies to the legislature the power to pass a special or local law in any case where a general law, which would afford the same relief, could be enacted; holding that the power to pass a special or local act under given circumstances empowered it to determine when the circumstances existed: *Davis v. Gaines*, 48 Ark. 370; *Boyd v. Bryant*, 35 Ark. 73, 37 Am. Rep. 6; *Carson v. St. Francis Levee District*, 59 Ark. 513; *Powell v. Durden*, 61 Ark. 21.

But how is it shown that the legislature decided that the building of a state capitol was a necessity of government? That question need not have been directly and expressly submitted for decision. When the vote of either house was taken for the purpose of deciding whether the bill introduced for the purpose should be passed, it was the duty of the presiding offi-

cer to decide whether it received the majority necessary for it to become a law, and if, a majority so voting, he decided that it had, and no appeal was taken, the house thereby ratified, approved, and adopted his decision. When it had passed both houses in this manner, it was enrolled, and in that form was signed by the presiding officer of each house in attestation of the fact that it had passed both houses with the requisite majority, and, thus attested, was taken by a committee to the governor for his approval. In this way the legislature decided that it had passed the bill by a constitutional majority, and thereby that the building of a new capitol was a necessity of government; for its action is referable only to the power under which it could have constitutionally passed the bill; and it thereby ⁵⁸⁰ accomplished what it had undertaken to do, because it had the authority.

2. Are there two subjects of appropriation in the act of April 17, 1899? Similar questions have arisen under a clause of the constitutions of many states which declared that no act should relate to more than one subject, and that should be expressed in its title. Under this clause, the courts have uniformly held that the unity of the subject of an act was preserved, and there was no violation of the constitution, so long as the different parts of the act relate, directly or indirectly, to the same general object fairly indicated by its title; and that the unity of object must be looked for in the ultimate end, and not in the details or steps leading to the end; for it is within the province of the legislature to determine and provide what means will contribute to the accomplishment of the general object of an act, and it may include under its title every means convenient or necessary or that may tend to carry into effect the main design, without regard to the secondary objects thereby accomplished. In speaking of a section of the constitution of Kentucky which declared, "No law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title," the supreme court of the United States said: "It is enough if the law has but one general object, and that object is fairly expressed in its title." Judge Cooley, in speaking of such clauses or sections, said: "The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone would not

only be unreasonable, but would render legislation impossible": *Fletcher v. Oliver*, 25 Ark. 299; *People v. Mahaney*, 13 Mich. 481, 495; *Ackley School District v. Hall*, 113 U. S. 135; *Carter County v. Sinton*, 120 U. S. 522; *Cooley's Constitutional Limitations*, 6th ed., 172.

From the doctrine of the cases referred to we deduce by analogy the following rule: The unity of the subject of an appropriation is not broken by appropriating several sums for several specific objects, which are necessary or convenient or ⁵⁸¹ tend to the accomplishment of one general design, notwithstanding other purposes than the main design may be thereby subserved. As an illustration, suppose the legislature provides for the building of a capitol and appropriates a certain sum for the purchase of the brick used in its construction, a certain sum for the granite, a certain sum for all other materials, and a certain sum for all the labor performed in its erection. There would be but one subject of appropriation, and that would be the construction of a capitol, and the sum total of all these appropriations would constitute only one appropriation made for that purpose.

But it is said that there are two subjects of appropriations in the act of April 17, 1899, and they are a new capitol and a new penitentiary. This statement is not accurate. The board of state capitol commissioners is not unlimited in its power to build a capitol. They are required to build it on the "present penitentiary grounds of the state." They can build it in no other place. The subject of the act is, then, the building of a state capitol upon the ground now occupied by the penitentiary. The legislature had the unquestionable right to select the location and fix the dimensions of the ground to be used for that purpose. In the exercise of this right, they set apart the whole of the penitentiary ground for the site. When they located it as they did, they knew that the destruction of the present penitentiary will necessarily follow, and that some place will be needed for the confinement and safekeeping of convicts when they will not be lawfully employed outside of the penitentiary walls. The laws of the state require a prison to be maintained for that purpose. The penalty for every felony which is not capital is imprisonment in the penitentiary. They doubtless foresaw that the building of a penitentiary cannot be postponed until the building of a new capitol, which will probably occupy many years, will be completed. They obviously found that it is necessary to procure other grounds, and to build a new pen-

itentiary for the convicts to occupy when the old will be vacated, before the capitol can be located and erected as they desired or intended; that this is an obstacle which must be first removed; and that the necessity of the state demands it. To provide for this necessity, they authorized the penitentiary board to procure other grounds, and cause new buildings and walls to be ⁵⁸² constructed for use as a penitentiary. This will be necessary, just as it is necessary to clear away the dense and heavy timber and undergrowth that encumber a lot of ground before the erection of a building on the same. The money that will be expended in the purchase of ground and the building of a new penitentiary will be in aid and for the furtherance of the main subject of appropriation, and will be expended in replacing what will be used in the accomplishment of the main object of the act; and the authority so to use it is equivalent to an appropriation of money to purchase grounds for the location of a capitol. In fact, every appropriation and provision in the act relates or contributes to the accomplishment of its general object—the building of a new capitol upon the penitentiary grounds.

The provisions made for the building of a penitentiary are peculiar. This act authorizes the penitentiary board to pay for the grounds, buildings, and walls out of the fund at its disposal at the time the act was passed. The money to be expended and liabilities to be incurred are limited by this fund. No other fund can be used, the liabilities incurred cannot exceed it, and the limits of expenditures are circumscribed by it. No separate appropriation, however, was made, but the board was authorized to use the fund already at its disposal for other and additional purposes, which are specified.

Giving to the act the benefit of all reasonable doubts as to its validity, which it is our duty to do, we hold that it is constitutional.

Decree affirmed.

STATUTES—UNITY OF SUBJECT.—A constitutional provision that “no bill shall contain more than one subject” does not prohibit comprehensive titles: Paxton etc. Co. v. Farmers’ etc. Co., 45 Neb. 884, 50 Am. St. Rep. 585; State v. Tibbets, 52 Neb. 228, 66 Am. St. Rep. 492, and note. Though there is more than one subject mentioned in an act, still if they are germane or subsidiary to the main subject mentioned in the title, or if relative directly or indirectly to the main subject, the act is constitutional: Fahey v. State, 27 Tex. App. 146, 11 Am. St. Rep. 182; Bobel v. People, 173 Ill. 19, 64 Am. St. Rep. 64, and extended note.

CONSTITUTIONAL LAW — LEGISLATIVE DISCRETION.—Where the constitution provides that the legislature "shall pass no special law for any purpose for which provision can be made by a general law," the legislature is the sole judge as to whether provision by a general law is possible: *State v. County Court*, 50 Mo. 317, 11 Am. Rep. 415. The legislature is the sole judge of the necessity of a statute: *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419; and of what is a public purpose: *Note to Zigler v. Menges*, 16 Am. St. Rep. 367.

STANDARD LIFE AND ACCIDENT INSURANCE COMPANY v. SCHMALTZ.

[66 ARKANSAS, 588.]

INSURANCE — ACCIDENT — DEATH BY ACCIDENTAL MEANS.—The rupture of a blood vessel in the stomach, caused by a sudden wrench of the body sustained in removing a heavy cylinder-head from an engine, and causing the death of the insured, who was a strong and healthy man, engaged as a machinist at the time the policy was issued and also at the time of the accident, is such a death as will sustain an action to recover under a policy of insurance against death resulting from injuries sustained solely by external, violent, and accidental means.

INSURANCE—ACCIDENT—INJURY FROM LIFTING.—If a person insured under an accident policy, providing that it shall not cover injuries from "lifting," ruptures a blood vessel of the stomach, causing death, by lifting a heavy cylinder-head in the course of his employment, a recovery may be had under the policy, if the application for insurance notified the insurer of the nature of the occupation of the insured.

INSURANCE—ACCIDENT—PROOF OF DEATH—WAIVER. If, after the death of the insured, the beneficiary notifies the insurer of the death of the insured, and requests it to send her the customary blanks for proof of death, and the insurer sends her a blank notice of death to be filled in, informing her that it would later send her others, and by its statements and conduct induces her to rely on it to send appropriate blanks until the time for making proof of death has expired, it cannot take advantage of its failure to do so, and must be deemed to have waived the proof of death.

INSURANCE—ACCIDENT—EVIDENCE.—In an action on an accident insurance policy, the admission of the testimony of the decedent's physician, detailing a declaration by the decedent made to him as to the cause of injury, and how it happened, is harmless error, if such evidence merely corroborates facts alleged in the complaint and undisputed by the answer or evidence.

EVIDENCE TENDING TO PROVE AN UNDISPUTED FACT cannot be prejudicial, however incompetent.

INSURANCE—ACCIDENT—EVIDENCE.—In an action on an accident insurance policy, where death is alleged to have been caused by the rupture of a blood vessel, resulting from lifting a heavy cylinder-head, it is proper to permit a physician, who has testified on cross-examination "that it was not necessary that there should be an unusual jerk or slip to rupture a blood vessel in the stomach, but that it might be ruptured by over-exertion, or by ex-

cessive lifting in the usual way," to testify, on redirect examination, "that such a rupture would more likely be caused by a jerk or wrench of the body."

H. C. Hynson and Scott & Jones, for the appellant.

Williams & Arnold, for the appellee.

⁵⁹⁰ **BATTLE, J.** Catherine Schmaltz sued the Standard Life and Accident Insurance Company for the sum of two thousand dollars, upon a policy of insurance against accidents, which was executed by the defendant to her husband, E. Schmaltz, in his lifetime. She alleged in her complaint that the defendant insured her husband, for her benefit, against the loss of life resulting from bodily injuries caused solely by external, violent, and accidental means; and that, on the third day of April, 1897, her husband, while engaged in the performance of the duties incident and pertaining to his employment and occupation as a machinist, in an effort to remove the cylinder-head of an engine he was repairing and to prevent the same from falling, violently, unexpectedly, and accidentally, and by external means wrenched his body in such a manner as to rupture one of the blood vessels of his stomach, and thereby caused his death; and that, immediately after his death, "she gave notice thereof, and within the time prescribed by said policy made out and forwarded to said insurance company proofs of his death, and that she had in all other respects complied with the provisions and requirements of said policy."

The defense to the action was as follows: The deceased did not suffer death from injuries by external, violent, and accidental means, the policy having specially exempted the defendant from liability for all injuries which resulted from lifting or over-exertion, and he came to his death by those means; and the proof of death had not been furnished as required by the policy.

The issues of fact were tried by a jury, and they returned a verdict in favor of the plaintiff for two thousand dollars, the amount of the policy, and the court rendered a judgment in her favor for that amount against the defendant; and it appealed.

1. The appellant contends that the verdict was not sustained by sufficient evidence. The undisputed facts are: 1. The appellant insured E. Schmaltz for the benefit of appellee, his wife, in the sum of two thousand dollars against loss of life resulting ⁵⁹¹ from bodily injuries caused solely by external, violent, and accidental means, and agreed to pay that amount to

her in the event of death caused by such means; and 2. The insured died within the term of his insurance from a sudden and unexpected rupture of one or more blood vessels in the stomach. But appellant insists that the death was not caused by external, violent, and accidental means. Upon this point the trial court instructed the jury as follows:

"1. If you find from the evidence that E. Schmaltz came to his death by violent, external, and accidental means in removing the cylinder-head of an engine, and if you further find that the removal or lifting of said cylinder was in the line of his occupation and duty as a machinist, and that he incurred no more risk or danger in removing or lifting said cylinder-head than was customary among reasonably prudent machinists in the performance of like duties, then you are instructed that the removal of said cylinder-head was not within the exceptions of the policy.

"2. A person may do certain acts, the result of which may produce unforeseen consequences, and may produce what is commonly called accidental death, although the means are exactly what the man intended to use and did use, and was prepared to use. In such case the means would not be accidental, although the result might be accidental. In this case you are told that the plaintiff must prove by a preponderance of the evidence that the injury to the deceased was caused by external, violent, and accidental means, and it is not sufficient that she prove that the result of the means employed by deceased was unforeseen, unexpected, and accidental.

"3. If the jury find from the evidence that, in the removing of the cylinder-head from the engine, and carrying it off and putting it down, deceased acted in the manner he intended to act, and used the means he intended to use in the manner he intended to use them, and in so doing a blood vessel was ruptured, then you are told that the injury was not the result of accidental means, and plaintiff cannot recover.

"4. The jury are instructed that if they find from the evidence that deceased was removing a cylinder-head from an engine, and in so doing he used the ordinary and usual means⁵⁹² employed under the circumstances then existing, and without the occurrence of any unforeseen, accidental, or involuntary movement of the body in removing said cylinder-head, a blood vessel was ruptured in the body of deceased, then the cause of the injury was not accidental, and you are instructed that the burden of proof is on the plaintiff to show by a preponderance

of the evidence that (there) was such an unforeseen and accidental or involuntary movement of the body, and that this caused the rupture of the blood vessel."

As the correctness of these instructions is not questioned by either party, we make no comment upon them.

The evidence adduced in the trial tended to prove, substantially, the following facts: E. Schmaltz, at the time he was injured, was a strong, healthy, active, muscular man, weighing from one hundred and seventy to one hundred and seventy-five pounds. He had occupied the position of railroad machinist for seven or eight years; was employed in that capacity at the time he was insured, and when he was injured, and in the intervening time; and had frequently lifted cylinder-heads from engines without accident or injury. Railroad machinists usually perform this duty; and it is not a dangerous undertaking, though the piece of machinery is unhandy. On the 3d of April, 1897, he removed a cylinder-head seventeen inches in diameter and about one inch thick, and weighing about eighty pounds, from an engine. He did so in the usual way. It was uncomfortably warm and he used some "waste" to protect his hands. The head stuck, and he picked up a steel bar and removed it, and as he did so he dropped the bar and caught it (the cylinder-head) as quickly as he could in order to prevent it from falling, and while he was in a stooping position, standing on his toes. A witness, who saw him catch it, says he "supposed from his movements it was as quick as possible." He was immediately taken sick. His stomach filled with blood, of which he vomited great quantities. He groaned; his face became deadly pale, and assumed a blanched, anxious expression, and clearly indicated that he was suffering great pain. He continued to vomit blood at intervals until he died. His physician, who attended him in his last illness, testified that his death was caused by the rupture of a blood vessel in his stomach.

⁵⁹³ We think that the evidence was sufficient to sustain the verdict of the jury as to the means of death. The facts in this case are similar to those in *United States Mut. Acc. Assn. v. Barry*, 131 U. S. 100. In that case the plaintiff's husband was, at the time of his injury, robust and in good health, weighing from one hundred and sixty to one hundred and seventy-five pounds. He and two others jumped from a platform four or five feet from the ground. The other two alighted safely; but the plaintiff's husband, Dr. Barry, ruptured a blood vessel of the stomach, from which he died. Upon this evidence the trial court instructed the jury as follows:

"We understand from the testimony, without question, that the deceased jumped from the platform with his eyes open, for his own convenience, in the free exercise of his choice and not from any perilous necessity. He encountered no obstacle in jumping, and he alighted on the ground in an erect posture. So far we proceed without difficulty; but you must go further and inquire, and here is the precise point on which the question turns, Was there or not any unexpected or unforeseen or involuntary movement of the body, from the time Dr. Barry left the platform until he reached the ground, or in the act of alighting? Did he or not alight on the ground just as he intended to do? Did he accomplish just what he intended to do, in the way he intended to? Did he or not unexpectedly lose or relax his self-control in his downward movement? Did his feet strike the ground as he intended or expected, or did they not? Did he or not miscalculate the distance, and was there or not any involuntary turning of the body, in the downward movement, or in the act of alighting on the ground? These are points directly pertinent to the question in hand.

"And I instruct you that if Dr. Barry jumped from the platform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected, or involuntary occurred, changing or affecting the downward movement of his body as he expected or would naturally expect such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated, or would naturally anticipate, then any resulting injury was not effected through any accidental means. But if, in jumping or ⁵⁹⁴ alighting on the ground, there occurred from any cause any unforeseen or involuntary movement, turn, or strain of the body, which brought about the alleged injury, or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he expected to make, or as it would be natural to expect under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulted, then the injury would be attributable to accidental means.

"Of course, it is to be presumed that he expected to reach the ground safely and without injury. Now, to simplify the question and apply to its consideration a common-sense rule, did anything, by chance or not, as expected, happen, in the act of jumping or striking the ground, which caused an accident?

This, I think, is the test by which you should be governed, in determining whether the alleged injury, if any was sustained, was or was not effected through accidental means."

Again on the question of external or visible marks of injury the court said: "Visible signs of injury, within the meaning of the certificate, are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidence which are visible signs of internal injury. Complaint of pain is not a visible sign, because pain you cannot see. Complaint of internal soreness is not such a sign, for that you cannot see, but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting or retching, or bloody or unnatural discharges from the bowels, if, in short, it sends forth to the observation of the eye, in the struggle of nature, any signs of the injury, then those are external and visible signs." In addition to this, the court instructed the jury that the jumping from the platform was external and violent means within the meaning of the policy. That the main question was "whether there was an accident."

Mr. Justice Blatchford in delivering the opinion of the supreme court of the United States in that case, on appeal from the decision of the lower court, said: "It is further urged that there was no evidence to support the verdict because no ⁵⁹⁵ accident was shown. We do not concur in this view. The two companions of the deceased jumped from the same platform, at the same time and place, and alighted safely. It must be presumed not only that the deceased intended to alight safely, but thought that he would. The jury were, on all of the evidence, at liberty to say that it was an accident that he did not. The court properly instructed them that the jumping off the platform was the means by which the injury, if any was sustained, was caused; that the question was, whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground; that the term 'accidental' was used in the policy in its ordinary, popular sense, as meaning 'happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected'; that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the in-

jury, then the injury has resulted through accidental means."

In the case before us the deceased was a strong, muscular man. The cylinder-head removed weighed only eighty pounds. He had been engaged in the service in which he was employed at the time of his death seven or eight years, and in that time had frequently removed cylinder-heads without detriment to himself. Other machinists had been accustomed to do the same kind of work without injury. The jury could have reasonably inferred from the evidence that the death of the deceased was caused by "external, violent, and accidental means."

The case at bar is unlike *Feder v. Iowa State etc. Assn.*, 107 Iowa, 538, 70 Am. St. Rep. 212, cited by appellant. In that case, "the decedent, at the time of his death, was about twenty-six years of age, and had been in Denver, where his death occurred, about nine months. He was suffering from consumption, and went to Denver, and resided there on account of his health. He was benefited by the change of climate and the medical treatment he received, and his health had been considerably improved, and was constantly improving at the ⁵⁹⁰ time of his death. During the day of his death he had been as well as usual, and in the evening was with two of his brothers in their office. Preparatory to leaving it, the decedent went to a window to close the shutters. A chair stood in front of the window, and he stood on his toes, and reached over the chair toward the shutters, and, as he did so, blood began to flow from his mouth. He was placed on a lounge, and died within a few minutes." In commenting on these facts, the court said: "The cause of his death was hemorrhage from a ruptured artery, and the evidence would have authorized the conclusion that the rupture of the artery was not due to the disease from which he was suffering. There is no evidence that he fell, slipped, lost his balance, failed to catch the shutter when he reached for it, or that it moved at his touch more or less readily than he had expected it would move; in other words, there is no evidence whatever that anything was done or occurred which he had not foreseen and planned, excepting the rupture of the artery, and the consequences which resulted from it."

In *Feder v. Iowa State etc. Assn.*, 107 Iowa, 538, 70 Am. St. Rep. 212, the decedent was in a debilitated condition. He was incapable of making much effort, physically, without subjecting himself to injury. In an effort to close the shutters of a window, which could not have required much exertion, he rup-

tured an artery. It did not appear in the report of the case we have that he had made the same or a similar effort at any time before the fatal injury. In the case before us the facts are different. The decedent, at the time of his injury, was healthy and strong, and had removed cylinder-heads frequently in safety, and others in the same employment had done the same act without injury. At the time he was injured he was attempting to perform the same act in the usual way, but there is reason to believe that he failed in this, and in an effort to prevent the head from falling he made some sudden, unusual, unexpected, and involuntary movement of the body, which caused the injury from which he died. In this way only we can reasonably explain why his last removal of the cylinder-head was attended with injury and the others were not.

2. One of the stipulations of the policy sued on was that it did not "cover . . . injuries . . . from ⁵⁹⁷ over-exertion, wrestling, lifting, . . . unnecessary exposure to danger." Appellant insists that it was exempt by this stipulation from liability for the injury which caused the death of Schmaltz. This contention is not correct. One of the duties of Schmaltz was to remove cylinder-heads, when it was necessary to be done for the purpose of repairing engines in the course of his employment. The dangers and probabilities of accidents happening while in the discharge of that duty doubtless entered largely into the consideration and contemplation of the parties when the contract of insurance was made. As an evidence of this fact, the appellant required the insured to state his occupation and employment in his application for insurance, and to agree, if he should engage in any occupation or work rated by the appellant "as more hazardous" than the class agreed to, that was the occupation stated in the application, that his "insurance, weekly indemnity, or specific indemnity" should "be limited to the sum which the premium paid by" him would purchase at the fixed rate fixed by the "appellant" for such "increased hazard"; and provided in the policy that "if the insured" was "injured in any occupation or exposure classed" by appellant "as more hazardous than that stated in said application, the insurance, weekly indemnity, or fixed indemnity" should "be for such sum" only as the premium would "purchase at the rate" fixed by "appellant" for such "increased hazard." Having obtained this knowledge or notice, and entered into this agreement, the appellant undoubtedly became bound, by the delivery of the policy, to insure Schmaltz, to the extent of

two thousand dollars, against all injuries which were caused solely by external, violent, and accidental means while he was doing lifting, or making exertions, which pertained to his occupation and employment. Having paid for this protection, he was entitled to its benefit: *Merrett v. Preferred etc. Acc. Assn.*, 98 Mich. 338; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 61, 67 Am. St. Rep. 900; *Insurance Co. v. Brodie*, 52 Ark. 11; *Wilson v. Northwestern Mut. Acc. Assn.*, 53 Minn. 470.

3. It is also provided in the policy that affirmative proof of death must also be furnished to appellant "within two months of time of death; . . . else all claims based ⁵⁹⁸ thereon shall be forfeited." The appellant insists that this proof was not furnished, and that, in consequence of such failure, the appellee is not entitled to recover; and appellee contends that this proof was waived.

The facts, as shown by the evidence, are substantially as follows: H. O'Flynn was, at the time Schmaltz was injured and died, general manager of appellant for the states of Missouri, Arkansas, and Texas, with his principal place of business in St. Louis, in the state of Missouri. When any person insured by appellant died from an injury, notice of his death was required to be sent to the insurer, and "proof blanks in such cases" were furnished by it through O'Flynn. He had authority to investigate, but not to settle amounts above fifty dollars. All blanks were furnished by the appellant.

On the 11th of April, 1897, and within six or seven days after the death of Schmaltz, and as soon as appellee was able, she wrote a letter to O'Flynn, asking for blanks in order to send proofs of the death of her husband. "She stated in her letter that he died from an accident on the 4th of April, 1897, giving the number of the policy by which he was insured and her address. On April 13th, O'Flynn, having received this letter, inclosed it to J. S. Heaton, the appellant's attorney who had charge of such matters, stating that he had merely notified the lady that her letter had been referred to the company, and that he would not do anything further until he heard from him. On the same day he wrote to Mrs. Schmaltz, acknowledging the receipt of her letter, saying that it had been referred to the company, and on hearing from them he would communicate with her further." On the seventeenth day of April he inclosed to Mrs. Schmaltz a blank "in which the full particulars of the death of E. Schmaltz were called for, asking her to fill it out and return it to him, and he would forward it to the home

office for final claim papers." She filled out the blanks, giving full answers to all questions contained therein, and forwarded it to O'Flynn by mail, and he sent it to appellant, and it received it. "On the 7th of May, 1897, Mrs. Schmaltz not having received final proof papers, wrote to O'Flynn a letter asking for an answer to her letter in which she had inclosed the blank notice of injury which had been furnished by him." Not hearing ⁵⁹⁹ from him, she went to H. C. Hynson, the attorney employed by appellant, and talked with him about the matter, and he said he could not understand her, and to send some one to talk to him about her business. She then went to see G. A. Hays, and requested him to look after her interest. On the 8th of June, 1897, Hays, in her behalf, wrote a letter to appellant, asking what it intended to do in reference to her claim under the policy. On the 24th of June he wrote to it (the appellant) that he understood from H. C. Hynson that no proof of death had been forwarded, and asked it to send the necessary blanks. (Appellant avoided mentioning the additional proofs until after the time for furnishing them had expired. In the meantime O'Flynn had made an investigation as to the death of Schmaltz. Hence the silence; no additional information was needed.) On the 1st of July, 1897, Hynson wrote a letter to Hays, in answer to his letter of June 24th, in which he denied liability under the policy on account of the failure to furnish proofs of the death of the insured, and refused, for appellant, to furnish blanks.

Appellant ought to have known that appellee relied upon it to furnish her with blanks to make all the proof of her husband's death that it required. It had been furnishing them for such purposes in such cases. Her letter to O'Flynn asking for blanks to make the necessary proof of death had been forwarded by its general manager to, and received by, it. In response it sent a blank notice of injury, and its agent, through whom it furnished blanks for proof, promised that he would, when the notice was returned to him, forward it to the home office for "final claim papers." The blank for notice was properly filled out, and returned to, and received by, appellant. It knew that she intended to collect the amount for which her husband was insured, and that she intended to make such proof of his death as it required, because she had given notice of death and asked for blanks for that purpose. There was sufficient evidence to induce the jury to believe that it (the appellant) willfully encouraged her to rely upon it to furnish the blanks to

make all the proof it required, and intentionally failed to furnish any, and thereby waived proof of death by accident—that it willfully and deliberately lulled her into security,⁶⁰⁰ and when the time for making the proof had expired informed her that she had forfeited the policy. It cannot take advantage of such wrong.

4. R. L. Grant testified, in the trial of this action, that he was a practicing physician, and that he attended E. Schmaltz in his last illness. He was allowed to testify, over the objection of appellant, that when he first visited him he asked him what caused the injury, “and he said he was lifting a cylinder-head from an engine at the roundhouse in the Cotton Belt yards, and he said he did not know exactly how it did occur”; that “he was lifting it off, and about the time he set it on the ground he felt an uneasiness in his stomach, felt something pop somewhere in him, he did not know where, and he walked off.” Appellant insists that the court erred in permitting the witness to testify as he did. If this contention be correct, which we do not decide, no prejudicial error was committed, because the fact that the death of Schmaltz was caused by the rupture of a blood vessel in his stomach while he was removing the cylinder-head of an engine he was repairing is undisputed. It was alleged by appellee in her complaint, and was not denied by appellant in its answer; and it was not disputed in the evidence. It is not, therefore, a reversible error.

5. After appellant had cross-examined the witness, R. L. Grant, the physician, appellee asked him whether a rupture of the kind received by Schmaltz “would not more likely occur from a jerk or wrench of the body than from ordinary lifting,” and he answered in the affirmative. Appellant objected to this testimony. But it had no right to complain; for on cross-examination the witness, in response to questions asked by it, had stated “that it was not necessary that there should be an unusual jerk or slip to rupture a blood vessel in the stomach, but that it might be ruptured by over-exertion, or by excessive lifting in the usual and ordinary manner of lifting or straining.” Having invited appellee to enter this field of inquiry, it should not complain because she accepted the invitation. The testimony elicited by the appellant on cross-examination related to the probability of the manner in which the injury occurred; and that elicited by the re-examination of the witness was confined to the same subject. The witness, on⁶⁰¹ cross-examination, thought that a blood vessel in the stomach

might be ruptured by over-exertion, or by excessive lifting in the usual and ordinary manner of lifting or straining, but, on re-examination, was of the opinion that such a rupture would more likely be caused by a jerk or wrench of the body.

6. We do not think that appellant's objection to the third instruction, given by the court to the jury at the instance of appellee, is tenable when all the instructions given are read and considered together, as it was the duty of the jury to do.

Judgment affirmed.

INSURANCE—DEATH BY ACCIDENT.—Death produced by a ruptured blood vessel, caused by fright or extraordinary exertion in the presence of danger, is accidental: *McGlinchey v. Fidelity etc. Co.*, 80 Me. 251, 6 Am. St. Rep. 190; but it is otherwise where the rupture is sustained while closing the shutters of a window, without the intervention of any unusual circumstances: *Feder v. Iowa State etc. Assn.*, 107 Iowa, 538, 70 Am. St. Rep. 212. In a case where death resulted from a rupture sustained by the deceased while exercising with Indian clubs, the jury were instructed that if the insured used the clubs in the ordinary way, and without the interference of any unusual circumstance, the injury was not accidental; but if there occurred any unforeseen, accidental, or involuntary movement of the body, which, in connection with the use of the clubs, brought about the injury, then such means were accidental and within the terms of the policy: *Note to Paul v. Travelers' Ins. Co.*, 8 Am. St. Rep. 785.

INSURANCE—PROOF OF DEATH—WAIVER.—By refusing to supply blanks for proofs of loss, or by refusing at first, but subsequently supplying them and accepting proofs without objection, the insurer waives proof of death or defects therein: *Grattan v. Metropolitan Ins. Co.*, 80 N. Y. 281, 36 Am. Rep. 617, and note. See, too, *McElroy v. Hancock Ins. Co.*, 88 Md. 137, 71 Am. St. Rep. 400, and note.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

FLORIDA SOUTHERN RAILROAD COMPANY v. HILL.

[40 FLORIDA, 1.]

PLEADING IN THE ALTERNATIVE.—If a pleader is in doubt whether he is entitled to one kind of relief or another upon the facts alleged in the bill, he may frame his prayer in the alternative, so that if he is not entitled to one he may obtain the other, and, if he is entitled to either kind of relief prayed, the defendant cannot demur to the bill, because the complainant is not entitled to the other. His remedy is to insist at the hearing that complainant be confined to such relief only as he may be entitled to under all the circumstances of the case as then presented.

RAILROADS—LIABILITY IN EQUITY FOR LAND TORTIOUSLY TAKEN.—If a landowner waives the tortious taking of his property for the purpose of a right of way by a railroad company and elects to regard the act of the company as done under the right of eminent domain, he is entitled to recover compensation for the land thus taken. In such case, the landowner has an equitable lien in the nature of a vendor's lien, and may resort to equity in the first instance to establish the amount justly due him as compensation, and to enforce his lien by charging the company's interest in the land and the improvements thereon for its payment.

RAILROADS—INJUNCTION TO COERCE COMPENSATION FOR LAND TORTIOUSLY TAKEN.—If a landowner waives the tortious taking of his property for a right of way by a railroad company, and elects to regard the act of the company as done under the right of eminent domain, he is estopped from dispossessing the company, and is not entitled to an injunction to coerce payment of compensation due for such land. In such case, a court of equity may declare the amount due for compensation to be a lien upon the land and improvements, and decree foreclosure of the lien and sale of the property to satisfy such amount.

R. W. & W. M. Davis, for the appellant.

J. W. Brady, for the appellees.

* CARTER, J. 1. We discover no error in overruling the first, second, and fifth grounds of the demurrer. Indeed, the appellant's counsel have not argued them in their brief, and, under our uniform rulings, they are for that reason to be treated as abandoned.

It is not suggested in what respect the prayer of the bill is inconsistent with its allegations; nor do we ⁷ perceive that it is so. The prayer is in the alternative, it is true, but that fact does not make it inconsistent, either in itself or with the allegations of the bill. It is entirely proper, in all cases where the pleader is in doubt as to whether he is entitled to one kind of relief or another upon the facts as alleged in the bill, to frame his prayer in the alternative, so that, if he is not entitled to the one, he may obtain the other, under such alternative prayer: 1 Beach's Modern Equity Practice, sec. 114. This disposes of the sixth ground of the demurrer. In such cases, if the complainant is entitled to either relief prayed, the defendant cannot demur to the bill because the complainant is not entitled to the other. His remedy is to insist at the hearing that complainant be confined to such relief only as he may be entitled to under all the circumstances of the case as then presented: 1 Beach's Modern Equity Practice, sec. 114; Western Ins. Co. v. Eagle Fire Ins. Co., 1 Paige, 284. If, therefore, the bill stated a case entitling complainants to relief under either branch of the alternative prayer, the fourth ground of demurrer, which took exceptions to only one kind of relief embraced therein, was properly overruled.

2. The bill in the present case charged a wrongful and illegal taking of complainants' property. The allegations of the bill in connection with the prayer show clearly that while the original taking and subsequent possession thereunder were without complainants' consent, and without condemnation proceedings, yet complainants did not claim any relief on that account, but, on the contrary, the complainants waived the tortious acts, ratified the defendant's possession, and regarded the taking and possession as done under the power of eminent domain. The object of the bill was not to dispossess the defendant because of wrongful taking, nor ⁸ to enjoin trespasses upon or further use of the land by the defendant, but to enforce payment of the compensation justly due complainants for their land either by means of an injunction, or by charging the specific land with its payment. For the reasons hereinafter stated, we do not think the remedy by injunction prayed

in the bill was available to the complainants, but, in considering the third ground of demurrer, we will inquire whether the compensation due for the land taken by defendant and its predecessor constituted an equitable charge or lien upon the land. In the case of Pensacola etc. R. R. Co. v. Jackson, 21 Fla. 146, the bill prayed an assessment of the damages sustained by a landowner by reason of the wrongful taking of his land by a railroad company for the purpose of a right of way and the operation of its railroad thereon; and that the company be enjoined from further operation of its road until the amount so ascertained was paid. It was held that the landowner, by reason of acquiescence in the alleged wrongful acts of the railroad company, had waived his right to an injunction, but that he had not lost his title to the land, and could maintain an appropriate action to recover his damages. It was further held that there was no necessity of invoking the aid of a court of equity to assess his damages on the ground of irreparable injury, or for the prevention of a multiplicity of suits, because where the injury was of a permanent nature, such as that caused by the construction and operation of a railroad across land, the damages recoverable at law would include the entire injury, and therefore there could be no danger of further litigation for injuries arising from the same cause. In Jacksonville etc. Ry. Co. v. Lockwood, 33 Fla. 573, it was again held by this court that the entire damage done to one's property in such cases could be ^{be} recovered in a single action of trespass, and that damages in such cases should not be limited to such as had accrued prior to the institution of the suit. This court has never determined whether a landowner, under the circumstances disclosed in these cases, could enforce a lien for his damages, in the nature of compensation, upon the property taken. In Walker v. Ware etc. Ry. Co., 12 Jur. 18, it was held by an English court that the amount of damages for purchase money and compensation, due a landowner from a railroad company, ascertained by means of an agreement for arbitration, was a lien upon the lands sold, in the nature of a vendor's lien, and could be enforced as such in a court of equity; that although the rights of the public should in such cases be considered, yet the railroad company could not take property without paying for it, and then say it was for the interests of the public that the property should be used by them, and so deprive the vendor of his lien, because the public could have no rights springing from injustice to others. Acting upon the intima-

tion of Judge Redfield, in *McAulay v. Western Vermont R. R. Co.*, 33 Vt. 311, 78 Am. Dec. 627, the supreme court of Vermont in *Kittell v. Missisquoi R. R. Co.*, 56 Vt. 96, held that although the vendor's lien had been expressly abolished in that state, yet, in a case where a railroad company had entered upon land by agreement with the owner, with an understanding that the damages caused thereby should be ascertained by arbitrators, the amount so ascertained became a charge or lien upon the land, in the nature of a vendor's lien, which equity would enforce by appropriate proceedings: See, also, *Kendall v. Missisquoi etc. R. R. Co.*, 55 Vt. 438; *Adams v. St. Johnsbury etc. R. R. Co.*, 57 Vt. 240; *Bridgman v. St. Johnsbury etc. R. R. Co.*, 58 Vt. 198; *Redfield on Railways*, *240. So, the supreme court of Ohio, in *Dayton etc. R. R. Co. v. Lewton*, 20 Ohio St. 401, held that where a landowner agreed with a railroad company to "release the right of way, and the right to enter upon and construct its railroad" for a certain consideration, such landowner had an equitable lien, in the nature of a vendor's lien, for the price agreed to be paid, and could enforce it in equity by foreclosure; that the lien applied as well to the sale of an easement in, as to a sale of the title to, or an estate in, the land. In *Western Pennsylvania R. R. Co. v. Johnston*, 59 Pa. St. 290, the principles upon which the landowner's claim for compensation or damages in the nature of such becomes a charge upon the land itself even in the hand of subsequent holders are very clearly stated, and applied in a legal proceeding: See, also, *Gilman v. Sheboygan etc. R. R. Co.*, 40 Wis. 653. It has been frequently held that where damages have been ascertained in the statutory mode, the amount becomes an equitable charge or lien against the lands and the improvements thereon, even in the hands of successors to the original taker, and that such lien or charge could be enforced in equity, though the courts differ as to the specific relief applicable in such cases, some holding that injunction will be granted to restrain the company's use of the land until it pays the damages; others, that the whole line of railroad will be ordered sold; and others, that the particular portion covered by the lien only will be ordered sold to pay the lien indebtedness: *Drury v. Midland R. R. Co.*, 127 Mass. 571; *Gillison v. Savannah etc. R. R. Co.*, 7 S. C. 173; *Mims v. Macon etc. R. R. Co.*, 3 Ga. 333; *Manchester etc. R. R. Co. v. Keene*, 62 N. H. 81, 122 et seq.; *Provolt v. Chicago etc. R. R. Co.*, 69 Mo. 633; *Cooper v. Anniston etc. R. R. Co.*, 85 Ala. 106;

Mills on Eminent Domain, sec. 144; Randolph on Eminent Domain, secs. 228, 296, 385. In *Organ v. Memphis etc. R. R. Co.*, 51 Ark. 235, the same principle was applied to a case where a railroad company took the land without agreement, and without condemnation; the court holding that where the property is seized in invitum by the company, though constituting a trespass, yet the owner may elect to regard the act of the company as done under the right of eminent domain, and demand and recover just compensation; that in such case the owner assumes to the company the relation of a vendor who sells real estate on a credit, and, while he holds the title, equity will enforce his claim against the land, as it would a vendor's lien: See, also, *Ashley v. Little Rock*, 56 Ark. 391. This view impresses us as being eminently just and correct in principle. For the transaction is nothing more nor less than an implied sale of an easement in the land, induced, it may be true, by the compulsory features of the power of eminent domain, the landowner knowing that he cannot prevent the taking of his property under such power, and the company knowing that it must pay for it if it does not take or keep it. Even where the original taking is tortious because against the consent of the owner, and without condemnation, it is, nevertheless, necessarily referable to the power of eminent domain, whose express provisions, protected and perpetuated by organic law, require that compensation be made for the property taken. The company can have no just cause of complaint if the landowner ratifies such tortious taking, by electing to ¹² treat its possession thereunder as valid, and asking to be compensated: *United States v. Great Falls Mfg. Co.*, 112 U. S. 645; *Cohen v. St. Louis etc. R. R. Co.*, 34 Kan. 158, 55 Am. Rep. 242; *Longworth v. Cincinnati*, 48 Ohio St. 637. It certainly cannot expect that a court of conscience will permit it to retain the property under these circumstances and yet deny the owner the right to subject such property to the payment of the compensation rightfully due for it. The compensation due the owner is always in part, and frequently wholly, purchase money for a perpetual interest in, or easement over, the land, and, inasmuch as equity always implies a lien for the purchase price upon a voluntary sale upon credit by the owner, it should for a stronger reason imply one for the same purpose, upon a compulsory sale under the power of eminent domain. The defendant and its predecessor in the present case have received the same rights and interests in complainants' property which they would have secured by regular

condemnation proceedings, i. e., the right to the perpetual use of the property for the purposes of their incorporation, for though the complainants retain the legal title to the land, they cannot use it to oust defendant's possession. They have ratified such possession by electing to treat it as valid in order to enforce a lien for compensation, even if they are not (under the decisions in Pensacola etc. R. R. Co. v. Jackson, 21 Fla. 146, and Griffin v. Jacksonville etc. Ry. Co., 33 Fla. 606), estopped by acquiescence from using their legal title to dispossess the defendant. In cases of this character, we think the landowner holds the legal title as security for the payment of the money due him for compensation, ¹³ and that he may resort to equity, in the first instance, to establish the amount of his recovery, and enforce the same by charging the company's interest in the land and the improvements thereon for its payment: 3 Pomeroy's Equity Jurisprudence, sec. 1260 et seq., and note 1 on page 1941. Our statutes providing proceedings for ascertaining the damages in eminent domain cases do not authorize the landowner to begin the proceedings. The company only can become the actor thereunder. They, therefore, do not furnish an adequate and speedy legal remedy to the landowner for the collection of his compensation. The remedies by injunction and ejectment are not available to collect the damages, but only to recover possession of the property, and, according to our previous decisions cited above, they would not be available for any purpose after the landowner had acquiesced in the building and operation of the road. It is true that, at law in an action of trespass, the amount of the landowner's damages can be ascertained and adjudged against the defendant, but the law can neither declare that its award is a specific charge upon the land, nor enforce the implied lien or equitable charge against the specific property. This charge upon the land, being a creature of equity, is properly enforced in a court of equity. We think the third ground of the demurrer was properly overruled.

The bill alleges that the original taking of complainants' land occurred about eight years before the filing of the bill. As the demurrer does not present the question, we do not consider whether the remedy here sought was stale, or barred by limitations.

3. We do not think the final decree was justified by the facts of the bill; nor do we think that payment of compensation for complainants' property should be coerced through the medium

of an injunction, where the ¹⁴ complainants have for eight years acquiesced in the taking of their property without objection, and now ratify same by asking to have their damages assessed and enforced as an equitable charge or lien upon the land. It has been held by the English courts that, where a landowner has an equitable lien as security for the purchase money of lands acquired by railroad companies for corporate purposes, he may enforce such lien in equity by an order to sell the property covered by such lien for the payment of the lien indebtedness, but that an injunction will not be granted to restrain the operation of the company's road until payment of the amount due the landowner: *Munns v. Isle of Wight Ry. Co.*, L. R. 8 Eq. Cas. 653; *Lycett v. Stafford etc. Ry. Co.*, L. R. 13 Eq. Cas. 261. This view commends itself to our judgment, especially in view of our previous decision in the case of *Pensacola etc. R. R. Co. v. Jackson*, 21 Fla. 146, a case somewhat similar in its main facts to the present one, so far as the relief by injunction is concerned. We there held that the acquiescence of a landowner in the illegal taking of his land, for a period of nine months, would debar him from an injunction restraining the operation of the company's road, though he was not barred of other remedies to collect his damages.

The final decree of the court below is reversed, with instructions to ascertain, either from the evidence already taken in the cause, or from other evidence to be taken if desired by complainants, the amount of compensation due complainants; to declare same a lien upon the land taken, and to decree a foreclosure of such lien and sale of the land in default of payment of the amount so ascertained, and for such other and further proceedings as may be consistent with this opinion and chancery practice.

MR. CHIEF JUSTICE TAYLOR dissented, on the ground that the complainants had a complete remedy at law, and that, therefore, there is no jurisdiction in equity. "The bill makes out a plain and clear-cut case of a tortious trespass upon, and wrongful seizure of, the complainants' land, nothing more and nothing less, and in the eyes of the law it cannot be comprehended in any other light than that of a tort, and for such torts the law courts afford an ample and complete remedy in the action of trespass *quare clausum fregit*. In which action this court has held, in *Pensacola etc. R. R. Co. v. Jackson*, 21 Fla. 146. and in *Jacksonville etc. Ry. Co. v. Lockwood*, 33 Fla. 573, that, in a case like this, the plaintiff can recover the entire damage sustained, including the value of the land wrongfully appropriated."

PLEADING IN THE ALTERNATIVE.—Where a complainant is in doubt as to the relief to which he is entitled, his prayer should be in the alternative for either one relief or the other as the court may decide: *Brown v. Wylie*, 2 W. Va. 502, 98 Am. Dec. 781; *Lloyd v. Brewster*, 4 Paige, 537, 27 Am. Dec. 88, and note. See, too, *Hall v. Henderson*, 114 Ala. 601, 62 Am. St. Rep. 141.

RAILROADS—RIGHT OF WAY.—If a railroad company constructs and operates its road through land of another, without having instituted condemnation proceedings, the owner of the land may elect to sue for damages: *Cohen v. St. Louis etc. R. R. Co.*, 34 Kan. 158, 55 Am. Rep. 242; or he may maintain ejectment: *Daniels v. Chicago etc. R. R. Co.*, 35 Iowa, 129, 14 Am. Rep. 490. Compare *Cairo etc. R. R. Co. v. Turner*, 31 Ark. 494, 25 Am. Rep. 564; *McAulay v. Western Vermont R. R. Co.*, 33 Vt. 311, 78 Am. Dec. 627. Where a landowner consents to the entry and construction of a railroad, he may have his damages assessed, or maintain ejectment. But the latter action will be treated as equitable in character, and execution on the judgment therein will be stayed for a reasonable time to allow assessment of damages: *Oliver v. Pittsburgh R. R. Co.*, 131 Pa. St. 408, 17 Am. St. Rep. 814, and note.

CORNELL v. FRANKLIN.

[40 FLORIDA, 149.]

APPELLATE PRACTICE—AMENDING WRITS OF ERROR.—The supreme court has discretionary power to permit writs of error to be amended by inserting therein the names of necessary parties who have been improperly omitted therefrom, and to strike out the names of parties who have been improperly included therein. Before the court can properly exercise such discretion in favor of having such an amendment made so as to bring into the writ new parties that have been omitted therefrom, the application therefor must be made before the time limited by law for suing out writs of error has expired.

APPELLATE PRACTICE—AMENDING WRITS OF ERROR.—If one against whom a judgment has been rendered jointly with another is not joined as a party plaintiff in a writ of error sued out from such judgment by his codefendant until after the expiration of the time limited for suing out writs of error, an amended writ of error bringing him in as a party plaintiff in error is, as to him, an entirely new writ, issued then, so far as he is concerned, for the first time, and as to him is a writ of error issued after the lapse of the time in which the law permits him to sue it out. The supreme court will not permit such an amendment.

APPELLATE PRACTICE—AMENDMENT OF WRITS OF ERROR.—The supreme court will not exercise its discretion in favor of allowing appeals or writs of error to be amended for the purpose of bringing in omitted parties, when it is shown by the record that the time limited for taking appeals or writs of error has expired as to parties seeking to be brought in by such amendment.

N. B. K. Pettingill and J. B. Whitfield, for the appellant.

W. Fisher and E. D. Beggs, for the appellee.

150 TAYLOR, C. J. At the last term, on the seventh day of December, 1897, upon reaching this case in its regular or-

der on the docket for final determination, the court dismissed the same for the reason that the judgment from which the writ of error was taken was a joint one against E. B. Cornell and Isaac Morgan, as copartners under the firm name of E. B. Cornell & Co., and the writ of error was sued out by and in the name of Elijah B. Cornell alone, omitting the joint judgment debtor and partner Isaac Morgan.

The sole plaintiff in error, Elijah B. Cornell, now moves the court to vacate the order of dismissal so entered, and to reinstate the cause upon our docket, and to allow the writ of error to be amended by inserting therein as a plaintiff in error jointly with said Elijah B. Cornell the name of his said cojudgment debtor Isaac Morgan and, upon such amendment being made, to grant a summons to said Isaac Morgan requiring him to join in prosecuting said writ of error, or in default thereof, that severance as to him be ordered. This application is strenuously objected to by the defendant in error upon the grounds, among others, that the application is not seasonably made, that it should have been made before ¹⁵¹ the court reached the cause and made final disposition thereof, and that it should have been made before the time had expired within which the newly proposed plaintiff in error, Isaac Morgan, could under the statute sue out a writ of error.

There is no doubt as to the discretionary power of this court to permit writs of error to be amended by inserting therein the names of necessary parties who have been improperly omitted therefrom, and to strike from it the names of parties who have been improperly included therein. But before the court can properly exercise such discretion in favor of having such an amendment made so as to bring into the writ new parties that have been omitted therefrom, the application therefor should be made before the time limited by law for suing out writs of error has expired. In *Loring v. Wittich*, 16 Fla. 323, this court permitted an amendment of the writ of error to be made by which divers parties improperly included therein as plaintiffs in error were stricken therefrom. In *Whitlock v. Willard*, 18 Fla. 156, that was an appeal in chancery, an amendment of the appeal by bringing in new parties was permitted, but in that case the time limited for taking appeals had not expired when the amendment was allowed, and no objection was urged against the same. In *Nash v. Haycraft*, 34 Fla. 449, an amendment of a writ of error bringing in an omitted party was permitted after the lapse of the time limited for suing out writs of error,

but no question was raised or urged in opposition to the amendment in that case on the ground that the bar of the statute had run against the new party plaintiff in error sought to be brought in by the amendment, and the amendment was applied for before the court had reached the case for final disposition, the plaintiff in error discovering the defect in his proceeding himself and ¹⁵² promptly after the discovery sought, of his own motion, to remedy the same by amendment. The court, not having the question of the bar of the statute raised or suggested, did not consider the same, nor did it consider the question as to what effect such an amendment would have upon the subsequent retention of the case by this court for final adjudication in the event the question of the bar of the statute as to the newly made party were raised and urged upon the court, even though raised subsequently to the permitting of the amendment.

If one against whom a judgment has been rendered jointly with another is not joined as a party plaintiff in a writ of error sued out from such judgment by his codefendant until after the expiration of the time limited for suing out writs of error, the amended writ of error bringing him in as a party plaintiff in error, is, as to him, an entirely new writ, issued then, so far as he is concerned, for the first time, and, as to him, is a writ of error issued after the lapse of the time in which law permits him to sue it out. In the case of *Smetters v. Rainey*, 14 Ohio St. 287, it is held that all the defendants in a joint judgment are necessary parties to an appellate proceeding seeking its reversal, and that if all such defendants are not made parties to such appellate proceeding within the time limited by law for instituting such appellate proceeding, the revising court has no such jurisdiction over the subject matter as will authorize it to reverse or modify any part of such judgment. It was further held in the same case that any such joint judgment debtor who is not made a party to the appellate proceeding instituted by his codebtor until after the statutory bar, may, upon being brought in, plead such statutory bar, and such plea will oust the jurisdiction of the revising court to reverse or modify any part of the judgment. To the same effect are the cases ¹⁵³ of *Curten v. Atkinson*, 29 Neb. 612; *Hendrickson v. Sullivan*, 28 Neb. 790; *Burke v. Taylor*, 45 Ohio St. 444; *Holloran v. Midland Ry. Co.*, 129 Ind. 274. While we are not called upon at this time to agree or disagree with the idea held out in these cases, that the failure to make necessary parties plaintiff in

error within the time limited for suing out writs of error presents, accurately speaking, a question of jurisdiction in this court to hear or determine the cause under any circumstances, yet we feel that the courts cannot override or ignore the limitations placed by law upon the institution of all classes of legal proceedings, but must recognize such bar, and apply it whenever clearly presented and insisted upon. When a judgment is rendered jointly against two, an appellate court cannot properly deal with it for review with only one of the parties before it who are jointly bound by it, for the reason that it would be passing upon and adjudicating the right of such absent party without giving him his day in court, and this the courts uniformly refuse to do. If the statute has run against such absent party so that the appellate proceeding as to him is barred, the court cannot override such bar by forcing him in as a party, when such bar is claimed and urged. As before seen, this court has an undoubted discretionary power to permit appeals and writs of error to be amended by bringing in omitted parties, but, for the reasons stated, it will not hereafter exercise such discretion in favor of such amendments, when it appears that the time limited by law for taking appeals or suing out writs of error has expired as to the parties sought to be brought in by such amendment.

Section 1271 of the Revised Statutes provides that all writs of error in civil actions shall be sued out within six ¹⁵⁴ months from the date of the judgment to be reviewed, reserving to persons laboring under the disabilities of infancy, coverture, and lunacy a further period of six months after their disability is removed. The judgment sought to be reversed through this writ of error was rendered on the third day of October, 1893. The time allowed by law to the joint judgment debtor, who is now sought by this motion to be brought in as a party plaintiff in error, for suing out a writ of error has, therefore, long since elapsed, and the appellate proceeding as to him is barred, and such bar is insisted upon.

The motion to reinstate the cause, and to be allowed to amend the writ of error by making Isaac Morgan a party plaintiff therein, and for a summons and severance as to him, are, therefore, hereby denied.

A WRIT OF ERROR CANNOT BE AMENDED by striking out the name of one as plaintiff and making him a defendant in error, where the record does not show that he should have been made a defendant and that he was improperly made a plaintiff: *Knox v. Steele*, 18 Ala. 815, 54 Am. Dec. 181.

MERCER v. STATE.

[40 FLORIDA, 216.]

INDICTMENTS—EVIDENCE TO QUASH.—Courts for the purpose of quashing indictments formally returned by a regular grand jury, never inquire into the character of the evidence that influenced the grand jury in finding such indictment.

CONSPIRACIES—DECLARATIONS OF CONSPIRATOR.—Every act and declaration of each conspirator to commit a crime in pursuance of the original concerted design, and with reference to the common object, done or made during the pendency of the criminal enterprise, is considered the act or declaration of all of them, and is original evidence against each of them.

HUSBAND AND WIFE AS WITNESSES—INTERESTED PARTY—PRIVILEGED COMMUNICATIONS.—A statute removing the incompetency as witnesses of husband and wife because of the interest of either, in both civil and criminal cases, does not empower either of them, when they become witnesses, to give illegal or incompetent testimony, by detailing or exposing those transactions or communications that have passed between them in the confidence and trust that should exist between husband and wife.

HUSBAND AND WIFE AS WITNESSES—INTERESTED PARTY—PRIVILEGED COMMUNICATIONS.—A statute removing the incompetency of husband and wife as witnesses for or against each other on the ground of interest does not remove the inhibition of the law against the exposure in evidence of confidential communications between them.

HUSBAND AND WIFE—PRIVILEGED COMMUNICATIONS.—Confidential communications between husband and wife are privileged, and the law forbids that they be detailed or divulged by either of the parties to the marriage.

HUSBAND AND WIFE—PRIVILEGED COMMUNICATIONS.—The matter that the law prohibits either the husband or the wife from testifying to as witnesses includes any information obtained by either during the marriage or by reason of its existence. It should not be confined to mere statements by one to the other, but embraces all knowledge upon the part of either obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known.

HUSBAND AND WIFE AS WITNESSES—INTEREST OF PARTY—EFFECT OF STATUTE.—If the incompetency as witnesses of husband and wife on the ground of interest has been removed by statute, either of them may testify, for or against the other, to any fact the knowledge of which was acquired by him or her independently of the marriage relation in any manner not involving the confidence growing out of such relation.

HUSBAND AND WIFE—LETTERS BETWEEN—PRIVILEGED COMMUNICATIONS.—Letters from a husband to his wife, or from her to him, are inherently and absolutely privileged communications and not admissible in evidence for or against the husband or wife, no matter in whose hands they may be.

WITNESSES—EVIDENCE TO SUPPORT GOOD CHARACTER.—If the character of a witness for truth is attacked in any way, either by showing contradictory statements of the matter of his evidence out of court different from that sworn to, or by cross-examination, or by general evidence of want of character for truth, or

that he has been convicted of crime, or engaged in some act affecting his credibility, like suborning or attempting to suborn a witness or suppress testimony, it is competent for the party calling him to give general evidence in support of his good character. In determining the propriety of the admission of evidence to sustain the character of the witness, the distinction should be observed between an attack upon the character of the witness as such, for credibility, and an attack upon the character of the testimony given, for belief.

WITNESSES—SUSTAINING CHARACTER OF.—If the character of a witness is gone into, the only proper subject of inquiry is as to his reputation for truth and veracity. Neither his general character, nor particular phases or traits of character, can be gone into, but the inquiry must be confined to his reputation of character for truth and veracity.

EVIDENCE—OBJECTION TO—WAIVER.—If objection to the introduction of incompetent evidence has been once properly taken and overruled by the court, it is not waived, although the same evidence may have been subsequently admitted, through other witnesses, without objection.

J. M. Calhoun, for the appellant.

W. B. Lamar, attorney general, and J. H. Carter, for the appellee.

218 TAYLOR, C. J. The plaintiffs in error were, on the tenth day of June, 1897, indicted jointly with one Westley Bush in the circuit court of Jackson county for willfully driving an ox upon a railroad track. Severance was ordered as to the defendant Westley Bush, on the application of the plaintiffs in error, and they were jointly tried and convicted **219** at the same term of the court and sentenced, each of them, to ten years in the penitentiary, and seek reversal here by writ of error.

Another indictment, signed by John H. Carter as acting state attorney, against the same parties, charging the same offense, was returned by the grand jury on the ninth day of June, 1897, but upon this indictment a nolle prosequi was entered, and the indictment upon which the trial was had was returned by the grand jury on the 10th of June, 1897, signed by William B. Farley, acting state attorney. To this indictment the defendants plead in abatement as follows: "Now come the defendants S. C. Mercer, Dock Mercer, Claude Wadsworth, and Westley Bush, and for plea in abatement to the indictment against them they say: That one John H. Carter was, on and before the ninth day of June, A. D. 1897, the local attorney of the Louisville & Nashville Railroad Company, a corporation, the moving prosecutor of these defendants, and that the said John H. Carter, while such local attorney under the employ and pay,

of said railroad company, was, on the thirty-first day of May, A. D. 1897, appointed and sworn in as acting state attorney in lieu of Hon. W. H. Milton, the duly elected and qualified state attorney, and as such acting state attorney, and also local attorney for the Louisville & Nashville Railroad Company, he advised, counseled, assisted, and attended upon, when so required, the grand jury which investigated the charges against these defendants; that as such local attorney for said railroad company he prosecuted these defendants upon examining trial, and still remains in the employ of said company. That under the sole advice, counsel, and instruction of the said John H. Carter, local attorney of said company as aforesaid, the grand jury of said county, on the ninth day of June, A. D. 1897, returned ²²⁰ a true bill against these defendants, charging them with the offense of driving an ox on the Louisville & Nashville railroad track, intending at such time that said ox should be run against, struck, and killed or injured by the engines and cars of said railroad company, which said indictment was signed by the said John H. Carter as acting state attorney, and who was also at said time under the employ and pay of said railroad company as aforesaid, which said indictment was received in open court and filed, and upon said indictment these defendants were arrested and held. That at the time of finding of said indictment and of the investigation of the charges against these defendants before said grand jury, the state had no other, save and except the said John H. Carter, attorney for said railroad company as aforesaid, and that said indictment was returned solely and exclusively under his, the said John H. Carter's, advice and counsel aforesaid. Reference is hereby made to said indictment filed May 9, 1897, which said indictment is on file in the office of the clerk of the circuit court of said county and state, and the same is asked to be taken as a part of this plea; that on the 10th of June, the said John H. Carter resigned as acting state attorney as aforesaid, and one W. B. Farley, Esq., was appointed by the court as acting state attorney in lieu of the said John H. Carter; that thereupon the said acting state attorney, on the same day, to wit, the tenth day of June, 1897, A. D., as aforesaid, nol prossed the said indictment filed on June 9, 1897, A. D., and in lieu of said indictment the grand jury returned another indictment against these defendants, charging them with the same offense as charged in the indictment filed June 9th, and which last-mentioned indictment is a true and correct copy of the indictment

filed June 9th, save and except that said indictment filed June 10, 1897, ²²¹ was filed by W. B. Farley as acting state attorney, instead of said John H. Carter as such acting state attorney, as the said indictment filed June 9, 1897, was signed; that between the time of the filing of the indictment returned by said grand jury on June 9th, signed by said Carter (which was not pressed as aforesaid), the time of the filing of the indictment on June 10th, signed by the said Farley, no witnesses were examined by the grand jury, so these defendants are informed and believe, as to the charges against these defendants, and the finding of the second indictment, as aforesaid, was based by said grand jury solely and exclusively from the testimony which was heard by them during the time that the said John H. Carter, attorney for said railroad company, was advising, counseling, and assisting said grand jury as acting state attorney as aforesaid. That the indictment under which these defendants are now charged was drawn up by the said John H. Carter, attorney for said railroad company, or under his directions, and that the only change between the first and second indictment against these defendants is the signature of the acting state attorney." To this plea the state demurred upon the grounds that said plea was vague, indefinite, and uncertain, and is insufficient to be replied to; and because the allegations in said plea contained set up no legal bar or abatement to a prosecution under said indictment. The sustaining of this demurrer by the court constitutes the first assignment of error.

The pith and substance of the plea, when stripped of its profusion of verbiage, is that a member of the bar who had been regularly appointed and qualified as acting state attorney, and who was the generally retained local attorney of the railroad company that was the chief prosecutor in the case, counseled, advised, and assisted the grand jury during the period when it found the first ²²² indictment against the defendants, and signed such indictment; that this indictment was nolle prosequed, and another acting state attorney appointed and qualified, and that a second indictment, signed by the newly appointed acting state attorney, was then found and returned by the grand jury, without having re-examined any witnesses, and without taking or hearing any evidence besides what was taken or heard on the finding of the first indictment.

The case of *Thalheim v. State*, 38 Fla. 169, is cited in support of this assignment. In that case objection was made, after the indictment was found, to several attorneys, who were in the

private employ of the prosecutors, taking part as assistant state attorneys in the trial of the cause, and it was held that the practice was permissible to allow counsel in the employ of private parties to assist the state attorney in the prosecution of persons charged with crime, but that the prosecution must be conducted by an official representative of the state, and should not be placed under the entire management and control of private parties or their attorneys, so that the public prosecution for a criminal offense should not degenerate into a private persecution. No question was raised in that case over the indictment because of private counsel being connected therewith. In this case the first appointed acting state attorney, as the plea shows, resigned the office, and the first found indictment officially signed by him was discontinued, and another disinterested acting state attorney being appointed in his place, the grand jury, itself an official body, at once found and returned another indictment that was signed by the newly appointed and untrammelled acting state attorney. This course avoided all semblance of irregularity, if any, in the first indictment found, and there is nothing whatever in the ²²³ defendants' plea that can affect the legality of the second one found, and upon which the trial was had. As to the assertion in the plea to the effect that the second indictment was found without the re-examination of any witnesses, or taking of any testimony except such as was heard on the finding of the first indictment, the rule is that a court, for the purpose of quashing an indictment, will never inquire into the character of the evidence that influenced a grand jury in finding such indictment: *State v. Boyd*, 2 Hill, 288, 27 Am. Dec. 376. The court below ruled rightly in sustaining the state's demurrer to this plea.

The second assignment of error is that the court erred in refusing to permit counsel for plaintiffs in error in the trial below to ask the witness W. O. Emanuel, on cross-examination, the questions: "Have you ever been prosecuted for perjury in the state of Florida?" "Have you been bound over to await the action of the grand jury of Jackson county, on the charge of perjury?" We find no such rulings in the record, and therefore this assignment must fall for want of a record basis.

After the state had introduced evidence that, if believed, established a conspiracy between the plaintiffs in error and their jointly indicted codefendant, Westley Bush, for the commission of the crime charged, the state attorney propounded to two different witnesses substantially the following question:

State whether or not you have ever heard either Sam Mercer, Westley Bush, Claude Wadsworth, or Dock Mercer say anything prior to the time of the night when the ox was killed, with reference to what was going to take place as to the ox alleged to have been driven on the track? These questions were objected to by the defendants on the grounds that they were not confined to statements made by the defendants who were on trial, but called for the ²²⁴ declarations of another person (Westley Bush) not on trial for the offense, and not made in the presence of the defendants being tried, and because no conspiracy between the defendants and Westley Bush had been alleged or proved, and because they were irrelevant and immaterial. The judge overruled the objections and permitted the questions to be put and answered, and the answers were to the effect that Westley Bush, one of the conspirators, prior to the consummation of the crime, had informed the witnesses that he and the other defendants were going to commit the crime, and stated the date on which they intended to perpetrate it. These rulings constitute the third and fourth assignments of error. These rulings were entirely proper. The rule found in 1 Greenleaf on Evidence, section 111, and approvingly quoted in *Hall v. State*, 31 Fla. 176, states the law on the subject, and sustains the propriety of the rulings: *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267.

The fifth, sixth, seventh, and eighth assignments of error are abandoned here by nonpresentation, and will, therefore, not be noticed, according to the established rule: *Clarke v. Southern Exp. Co.*, 33 Fla. 617; *Blount v. State*, 30 Fla. 287.

Upon the cross-examination of J. E. Brock, one of the state's witnesses, a letter written by him to his wife was exhibited to him by the attorneys for the defendants, and he was asked if he had written such letter, to which he replied, in substance, that he had written the letter, but that the following words, "that I never saw the boys that night that the ox was put upon the road," then contained in it were not put into the letter by him, and were not in it when he sent it to his wife, and he called attention to the fact that the letter on its face showed ²²⁵ that something else had been originally written where the quoted words occurred, but had been erased and the quoted words inserted by someone else. With this identification of the letter, and by consent of the state attorney as to the time and order of its introduction, it was offered in evidence on behalf of the defendants in rebuttal of the evidence of the witness who

wrote the letter, but its admission in evidence was objected to, both by the state and by the witness whose letter it purported to be, upon the ground that, being a letter from the witness to his wife, it was a confidential communication as between husband and wife, and, therefore, privileged. This objection was sustained and the exclusion of the letter is assigned as the ninth error. Chapter 4029 of the laws approved June 4, 1891, entitled: "An act to amend chapter 3124 of the laws of Florida so as to authorize both husband and wife to testify in civil actions in which either may be interested," provides: "That in the trial of civil actions in this state neither the husband nor the wife shall be excluded as witnesses, where either the said husband or wife is an interested party to the suit pending." Section 2863 of the Revised Statutes, under the heading, "Competency of Witnesses," provides that: "The provisions of law relative to the competency of witnesses in civil cases shall obtain in criminal cases." In construing these statutes and their bearing upon each other this court, in the case of *Everett v. State*, 33 Fla. 661, and again in *Walker v. State*, 34 Fla. 167, 43 Am. St. Rep. 186, held, in substance, that their joint effect was to abrogate the old common-law rule as to the competency of witnesses that forbade either the husband or wife to testify at all in any case, either civil or criminal, where either of them was an interested party; that they made both the husband and wife competent witnesses to testify for or ²²⁶ against each other in all cases, civil or criminal, where either of them was an interested party. But in neither of these cases decided here, nor in any other state having similar enabling statutes, have we been able to find any declaration that the removal from husband and wife of their incompetency as witnesses because of interest in the cause has the effect of empowering either of them, when they become witnesses, to give illegal or incompetent testimony, by detailing or exposing those transactions or communications that have passed between them in the sacred confidence and trust that should exist between husband and wife; or that the removal of the incompetency of husband and wife as witnesses on the ground of interest removes the inhibition of the law against the exposure in evidence of confidential communications between them. Such confidential communications between husband and wife have always been regarded as privileged, and, when attempted to be detailed or divulged by either of the parties to whom the communication has been intrusted, the law not only forbids, but will not permit it to be

done, but regards it as a character of testimony that such witnesses are not competent to depose, and upon the same ground that it prohibits the violation by an attorney of the confidence reposed in him by his client, that of public policy. Society has a deeply rooted interest in the preservation of the peace of families, and in the maintenance of the sacred institution of marriage, and its strongest safeguard is to preserve with jealous care any violation of those hallowed confidences inherent in, and inseparable from, the marital status. Therefore, the law places the ban of its prohibition upon any breach of the confidence between husband and wife by declaring all confidential communications between them to be incompetent matter for either of them to expose as witnesses. The reason ²²⁷ of the old rule for rendering interested witnesses incompetent to testify at all in any case to which they were parties was because their interest was supposed to be such a strong incentive to perjury, and where husband or wife was interested in a cause, both of them were excluded as incompetent witnesses for any purpose because of their unity of interest; they, in the eye of the law, being regarded as one person, and whenever either was interested, both were considered to be equally interested, and the incentive to perjury from such interest was considered to be as strongly operative upon the one as upon the other. But the reason of the rule for excluding the confidences between husband and wife as incompetent matter to be deposed by either of them, though they may be competent witnesses to testify to other facts, is found to rest in that public policy that seeks to preserve inviolate the peace, good order, and limitless confidence between the heads of the family circle so necessary to every well-ordered civilized society. The matter that the law prohibits either the husband or wife from testifying to as witnesses includes any information obtained by either during the marriage and by reason of its existence. It should not be confined to mere statements by one to the other, but embraces all knowledge upon the part of either obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known. And the same rule prevails in full force even after the marital relation has been dissolved by death or divorce. Where the incompetency as witnesses of husband and wife on the ground of interest has been removed by statute, as is the case here, either of them may testify, for or against the other, to any fact the knowledge of which was acquired by them independently of their marriage

relation, in any manner not involving the confidence growing out of the marriage ²²⁸ relation. As Mr. Greenleaf puts it: "The great object of the rule is to secure domestic happiness by placing the protecting seal of the law upon all confidential communications between husband and wife; and whatever has come to the knowledge of either by means of the hallowed confidence which that relation inspires cannot be afterward divulged in testimony, even though the other party be no longer living": 1 Greenleaf on Evidence, 15th ed., secs. 254, 334, 337; 2 Taylor on Evidence, secs. 908-910; Commonwealth v. Sapp, 90 Ky. 580, 29 Am. St. Rep. 405, and citations in notes; Jacobs v. Hesler, 113 Mass. 157; Drew v. Roberts, 48 Me. 35; White v. Perry, 14 W. Va. 66; Aveson v. Kennaird, 6 East, 188; Keator v. Dimmick, 46 Barb. 158; Robin v. King, 2 Leigh, 140; Bigelow v. Sickles, 75 Wis. 427; McGill v. McGill, 19 Fla. 341; Lucas v. Brooks, 18 Wall. 436; Henderson v. Chaires, 25 Fla. 26; Robinson v. Chadwick, 22 Ohio St. 527; Raynes v. Bennett, 114 Mass. 424; Ayres v. Ayres, 28 Mo. App. 97; Goodrum v. State, 60 Ga. 509; Wilkerson v. State, 91 Ga. 729, 44 Am. St. Rep. 63; Selden v. State, 74 Wis. 271, 17 Am. St. Rep. 144; Lingo v. State, 29 Ga. 470. The letter from the husband to the wife here excluded, however, was not sought to be introduced directly through the wife as a witness to whom it had been written, but in some manner not disclosed by the record, had found its way to the possession of the attorneys for the defendants, and its offer in evidence was from their immediate custody. There is a considerable array of authorities to the effect that when confidential communications between husband and wife or between attorney and client get out of the possession and control of the parties to the confidence and that of their agents and attorneys, and find their way into the ²²⁹ possession and control of third persons, regardless of the manner in which the possession thereof may be obtained by such third persons, that then such communications lose the protected privilege of the law and become competent and admissible evidence. To this effect, see 1 Greenleaf on Evidence, sec. 254 a, and the cases there cited; also the cases cited in the notes to Commonwealth v. Sapp, 29 Am. St. Rep. 415 et seq. We cannot agree to the correctness of this rule thus broadly laid down by these and other authorities, but think the policy of the law, that forms the foundation of the general rule, is far more strongly upheld and subserved by those authorities that recognize and declare certain classes of communications to be privileged from

the inherent character of the communication itself, and that in such cases the privilege attaches to the communication itself and protects it from exposure in evidence wheresoever or in whosoever hands it may be. Judge Shiras, now of the supreme court of the United States, in the case of *Liggett v. Glenn*, 51 Fed. Rep. 381, with great force and clearness explains what we conceive to be the correct rule as follows: "In considering questions of this kind, regard must be had to the nature of the evidence sought to be elicited. It not unfrequently happens that deeds, contracts, or other written instruments may be delivered by a client to an attorney under such circumstances that the attorney cannot be compelled or permitted to produce the same in evidence against his client at the demand of an adversary party. In this class of cases the deed or other written instrument is not itself privileged. It is merely the possession of the attorney that is protected. As he received the instrument by reason of the confidential relation of client and attorney, he cannot be compelled to yield up such possession at the demand of another, nor to reveal the contents of the paper. In ²³⁰ such cases, however, it is open to the other party to prove, by any competent evidence, the contents of the paper because the same are not, in and of themselves, privileged. The decisions, in this class of cases do not touch the principle that is involved in the matter of confidential communications, whether oral or written, passing between client and counsel. In the latter instance the privilege attaches to the communication itself. In order that there may be perfect confidence established between client and counsel, and upon considerations of enlightened public policy, the rule has been established that the client may freely communicate to his counsel all facts connected with the subject out of which grows the relation in question, and that the communication, thus confidentially made, cannot be used in evidence against him, unless he himself, by some unequivocal action on his part, deprives the communication of its privileged character, and thereby renders it competent evidence against himself. To fairly carry out the real purpose of the rule, it must be held that privileged communications are, in and of themselves, incompetent, regardless of the mere manner in which it is sought to put them in evidence. . . . The admissibility of the communication, in our judgment, is not dependent upon the manner in which control thereof is obtained from the counsel, but upon the inherent character of the communication itself. If the admission or statement sought to be

put in evidence was made by reason of the confidential relation existing between client and counsel, it becomes a privileged communication, and as such it is not competent evidence against the client. Its competency is not dependent upon the mere manner in which knowledge thereof may be obtained from counsel. The principle forbidding its use is not adopted as a mere rule of professional conduct on the part of the ²³¹ attorney. It confers a right upon the client for his protection and advantage, and which he alone is authorized to waive. It will not do to hold that the communication loses its confidential and privileged character if knowledge thereof can be obtained by means which do not involve the counsel in a breach of professional duty. . . . The argument, founded upon the assumption that the admissibility of confidential communications between client and counsel is dependent solely upon considerations of the duty of counsel not to make known that which was communicated to him professionally, is, in our judgment, faulty, in that it ignores the main purpose of the rule, which is that the client shall be at liberty to freely communicate to his attorney knowledge of all matters connected with the business in hand upon the assurance that confidential communications thus made are privileged and cannot be used in evidence against him, unless he deprives them of their privileged character." The same reasoning applies with equal, if not greater, force to the communications between husband and wife, upon the inviolacy of which depends that perfect confidence between the twain so necessary to maintain the sacred institution of marriage up to that standard demanded by every well-ordered and civilized society. And the same reasoning and rule was applied in the exclusion of a letter from husband to wife in the case of *Wilkerson v. State*, 91 Ga. 729, 44 Am. St. Rep. 63; *Bowman v. Patrick*, 32 Fed. Rep. 368; *Scott v. Commonwealth*, 94 Ky. 511, 42 Am. St. Rep. 371; *Regina v. Pamentor*, 12 Cox C. C. 177; *Dreier v. Continental Life Ins. Co.*, 24 Fed. Rep. 670; *Mahner v. Linck*, 70 Mo. App. 380; *Mitchell v. Mitchell*, 80 Tex. 101. We think the letter offered in evidence here from the witness Brock to his wife was inherently a confidential communication, and that it was ²³² privileged from exposure in evidence, in and of itself, regardless of the custody from which it was produced at the trial, and that its admission in evidence was properly refused.

Several witnesses were introduced in rebuttal by the state for the purpose of establishing the general reputation and char-

acter for truth and veracity of several other state witnesses. This evidence was objected to by the defendants on the ground that the witnesses for the state, whose characters were sought by it to be sustained, had not been impeached by the defendants, and because their reputation for truth and veracity had not been attacked and were not at issue. These objections were overruled and the testimony admitted, and this ruling is assigned as the tenth and twelfth errors. There was no error here. The general characters of the state's witnesses, whose reputation for truth and veracity in the communities in which they lived was sought to be established and sustained by the challenged evidence, had not been attempted to be impeached by any direct general assault thereon, it is true, but the defendants, as to each of said witnesses, had not only on cross-examination and by their own witnesses undertaken to cast discredit upon them for truth and veracity, but introduced various witnesses who testified to contradictory statements alleged to have been made by them on other occasions respecting the subject matter of their testimony conflicting with the evidence at the trial. The rule governing the admissibility of evidence to sustain the general character of a party's witness for truth and veracity is very well settled, and is accurately stated by Judge Redfield in *Paine v. Tilden*, 20 Vt. 554, as follows: "It is now well settled that, whenever the character of a witness for truth is attacked in any way, it is competent for the party calling him to give general evidence ²³³ in support of the good character of the witness. And we do not think it important whether the character of the witness is attacked by showing that he has given contradictory accounts of the matter out of court, and different from that sworn to, or by cross-examination, or by general evidence of want of character for truth." In *Stevenson v. Gunning*, 64 Vt. 601, it is said: "It is observable that a distinction is taken between an attack upon the character of the witness as such for credibility and the character of the testimony given for belief. It is only when the character of the witness for credibility is directly attacked, by general evidence regarding his standing and character for truth and veracity, or by showing that he has made contradictory or inconsistent statements, either out of court, or in court, or that he has been convicted of some crime, or engaged in some act affecting his credibility, like suborning or attempting to suborn a witness, or suppress testimony in the case on trial, that sus-

taining evidence can be used": Phillips v. State, 19 Tex. App. 158; Glaze v. Whitley, 5 Or. 164; Clark v. Bond, 29 Ind. 555; Harris v. State, 30 Ind. 131; State v. Cooper, 71 Mo. 436; Burrell v. State, 18 Tex. 713; George v. Pilcher, 28 Gratt. 299, 26 Am. Rep. 350; Isler v. Dewey, 71 N. C. 14; Holley v. State, 105 Ala. 100; 1 Greenleaf on Evidence, sec. 462.

In addition to the proof by the state to sustain the general character of its witnesses for truth and veracity, the state attorney was allowed, over the objection of the defendants, to go further in its sustaining proof, and to interrogate the supporting witnesses by independent questions as to the character for honesty of its sustained witnesses, and this ruling is assigned as the eleventh error. The majority of the court are of the opinion that this ruling is reversible error. The general well-settled ²³⁴ rule of law is, that when the character of a witness is gone into, the only proper object of inquiry is as to his reputation for truth and veracity: 1 Taylor on Evidence, 257 et seq., and cases cited. Neither his general character, nor particular phases or traits of character can be gone into, but the inquiry must be confined to his reputation or character for truth and veracity. The writer of this opinion, while concurring in the correctness of the rule announced, cannot agree with the majority of the court that the inquiry into the honesty of the state's witnesses permitted in this case is sufficient cause for reversal. The inquiry into the reputation of the witnesses for honesty was irrelevant and incompetent, it is true, but my view is, that the state had the right, under the circumstances, to sustain the character of its witness for truth and veracity to the fullest extent, and the further inquiry as to their honesty could not possibly have affected or prejudiced the defendants in any manner, except through its bearing upon the question of the truth and veracity of the state's witnesses. There was no issue or question in the case that turned upon, or that could be affected or influenced in any manner by, an inquiry into the character of the state's witnesses for honesty as contradistinguished from truthfulness. Therefore, according to my view, the permitted inquiry into the character of the witnesses for honesty amounted to nothing more in this case than an indirect inquiry into their character for truth and veracity, and into the latter, as before seen, the state had the fullest right to go. I therefore think that while the sustaining proof should not have been permitted as to the honesty of the

state's witnesses, that it was harmless error in this case, and does not justify reversal.

The defendants objected to the evidence of only one or two of the first witnesses offered by the state to ²³⁵ sustain the character of its other witnesses for truth and veracity and honesty, but several other witnesses were subsequently offered by the state who testified, without objection, to the good character of the same state's witnesses for truth and veracity and honesty. It is contended for the state that this failure on the part of the defendants to extend their objections to all the sustaining testimony was a waiver of the objections made to the first witnesses giving the same evidence, and cured the error, if any, in the admission of that specifically objected to. Many authorities sustain this contention. But we are of opinion that the rule founded in the soundest reasoning is announced in those cases that hold that: "When an objection to the introduction of incompetent evidence has been once properly taken, and overruled by the court, it is not waived, although the same evidence may have been subsequently admitted, through other witnesses, without objection": *Louisville etc. R. R. Co. v. Gower*, 85 Tenn. 465; *Graves v. People*, 18 Colo. 170; *Pfeil v. Kemper*, 3 Wis. 315 (284).

The thirteenth and fourteenth assignments of error complain of the two following charges given by the court to the jury: "1. In determining what the facts are, you are the sole judges of the evidence and of the credibility of the witnesses. If you are not able to reconcile the testimony of the different witnesses, it is your province to determine for yourselves who is, and who is not, worthy of belief, and who is speaking the truth. In determining this you may consider the attitude of the several witnesses, both for the state and the defendants, with respect to the case, what interest they have in it, or in its results, what relationship, if any, they bear to those who are interested therein, what influences, if any, are operating upon them in giving their testimony, their ²³⁶ manner, and the nature of their testimony, and their general reputation for truth in the community in which they live; 2. This is not a private suit between the Louisville & Nashville Railroad Company and the defendants, but is a prosecution in the name of the state of Florida against these defendants for alleged violation of a law of the state which is designed to protect the safety of the traveling public, and, if you have any bias or prejudice for or against the railroad company, it is your duty to discard it from

your minds in considering the evidence in this case, and to render a verdict according to what you may find to be the facts." It is urged against these instructions that they had a tendency to confuse and mislead the jury. We discover nothing improper in either of them. They clearly state the propositions intended thereby to be conveyed to the minds of the jury, and contain nothing that is improper from a legal standpoint, or that was not warranted by the facts and circumstances of the case.

The fifteenth, sixteenth, seventeenth, and eighteenth assignments of error are abandoned. The nineteenth, twentieth, twenty-first, and twenty-second assignments of error are predicated on the refusal of the court to grant a new trial upon the grounds that the verdict was contrary to the evidence, contrary to law, and was not supported by the evidence. In view of the reversal for the error found and the grant of a new trial, we abstain from any consideration of these assignments. The twenty-third assignment of error is abandoned here.

For the error found in the admission of proof as to the character for honesty of the state's witnesses, the judgment of the court below is reversed and a new trial ordered.

AN INDICTMENT WILL NOT BE QUASHED because of the character of the evidence which influenced the grand jury in finding it: *State v. Boyd*, 2 Hill, 288, 27 Am. Dec. 376. See, also, *Commonwealth v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468, and note.

CONSPIRACY—DECLARATIONS OF CO-CONSPIRATORS.—Every act and declaration of each member of a conspiracy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is original evidence against each of them: *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267; *McKenzie v. State*, 32 Tex. Cr. Rep. 568, 40 Am. St. Rep. 795, and note. But see *Conde v. State*, 35 Tex. Cr. Rep. 98, 60 Am. St. Rep. 22, and note.

EVIDENCE.—LETTERS WRITTEN BY A HUSBAND to his wife are privileged communications, and not admissible in evidence against him: *Selden v. State*, 74 Wis. 271, 17 Am. St. Rep. 144, and note; *Scott v. Commonwealth*, 94 Ky. 511, 42 Am. St. Rep. 371, and monographic note. Compare *People v. Hayes*, 140 N. Y. 484, 37 Am. St. Rep. 572.

WITNESSES.—A HUSBAND OR WIFE is incompetent as a witness for or against the other to testify as to any information obtained by either during the marriage, and by reason of its existence; and the communications as to which neither can testify should not be confined to mere statements by one to the other, but should embrace all knowledge obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known: *Commonwealth v. Sapp*, 90 Ky. 580, 29 Am. St. Rep. 405. But this rule does not extend to facts which come to the knowledge of either during the existence of the relation, but not

confidentially, nor by means of the situation of husband and wife: Note to Commonwealth v. Sapp, 29 Am. St. Rep. 419, 420.

WITNESSES.—INQUIRY INTO THE CHARACTER of a witness should be confined to his general reputation for truth, and should not extend to his general moral character: Ayres v. Duprey, 27 Tex. 593, 86 Am. Dec. 657; Crane v. Thayer, 18 Vt. 162, 46 Am. Dec. 142. Contra, Birmingham Union Ry. Co. v. Hale, 90 Ala. 8, 24 Am. St. Rep. 748; Gilliam v. State, 1 Head, 38, 73 Am. Dec. 161. See the monographic note to Allen v. State, 73 Am. Dec. 762-777, discussing impeachment of witnesses.

TRIAL—OBJECTIONS TO TESTIMONY NEED NOT BE REPEATED.—Objection to the first of a series of successive questions, if improperly overruled, may be regarded as going, not merely to the first question but to the others which sprang naturally from it, and the party will be allowed the benefit of his exception as to the whole: Barton v. Kane, 17 Wis. 38, 84 Am. Dec. 728; People v. Mullings, 83 Cal. 138, 17 Am. St. Rep. 223.

STATE v. CONE.

[40 FLORIDA, 409.]

MANDAMUS IN AID OF EXECUTION.—Mandamus does not lie to compel a sheriff to sell real estate levied upon by him under an execution upon an ordinary money judgment. Adequate legal remedies exist at law, in such case, against the sheriff for his neglect of duty.

R. W. Williams, for the relator.

W. N. Cone, in propria persona, for the respondent.

400 CARTER, J. This court, on January 22, 1895, upon petition of the relator, issued an alternative writ of mandamus to respondent, commanding him to sell according to law certain real estate levied upon by him under an execution more fully described hereinafter, and to collect the amount due upon said execution, or show cause before this court why he had not done so on February 5, 1895. **410** From the recitals of the alternative writ it appears that on May 8, 1894, the relator obtained judgment against George A. Lamb, N. M. Bowen, H. H. Emmons, and William Hardon for two hundred and eighty-six dollars and nineteen cents and costs, in the circuit court of Leon county; that thereafter, on May 10, 1894, a writ of execution issued upon said judgment from said court, addressed to all and singular the sheriffs of the state of Florida to execute; that this execution was by the sheriff of Leon county transmitted to respondent with instructions to levy and collect same

from property in Columbia county subject thereto; that respondent received said writ, and about May 24, 1894, levied same upon certain real estate in Columbia county as the property of said William Hardon, and advertised same to be sold on the first Monday in July, 1894; that, disregarding his duty in the premises, the respondent declined to sell the property as advertised, and declined and refused to readvertise or to take any other or further steps to sell said property to satisfy the execution, although relator had repeatedly demanded of him to proceed with said sale. The respondent's return denies none of these allegations, but insists that his refusal to sell was rightful, because, as he alleges, the judgment upon which said execution issued was recovered in Leon county circuit court, and a transcript thereof had never been recorded in the proper record of Columbia county where the real estate levied upon was situated; that for this reason the judgment was not a lien upon the land, and he had no power to sell under the execution issued thereon from the Leon county circuit court. Respondent further alleges that he had offered to proceed with the sale if relator would give an indemnity bond, which the relator had declined to do. Relator moves to quash the return and to issue the peremptory writ against respondent, upon the ground that the return ⁴¹¹ does not set forth sufficient facts to justify respondent's refusal to sell under the writ of execution.

In *State v. Craft*, 17 Fla. 722, it was said, in a case somewhat similar to the present one, that "the proceeding by mandamus can only be resorted to where there is no other adequate legal remedy to accomplish the purpose. The plaintiff wants to make his money; he has nothing else in view. If a sheriff refuses to execute the writ, when it is his duty to execute it, the plaintiff may have his action at law against the sheriff. We have not found any case decided by the courts, allowing the mandamus to compel a sheriff to make a levy under an execution in his hands. The court has such control over its officer, and the plaintiff has such right of action for willful neglect of duty, that it seems hardly possible that a mandamus should be resorted to, though *Moses on Mandamus*, page 60, suggests that such writ may lie when other remedies prove to be inadequate. But that point has not been reached in this case." In that case the sheriff of Hillsborough county declined to levy an execution in favor of relator against one Kennedy, upon certain real estate pointed out to him by relator as the property of Kennedy, basing his refusal upon the ground that the property was

recorded in the name of Kennedy's wife. This court affirmed a ruling of the circuit court of Hillsborough county, dismissing an alternative writ of mandamus against the sheriff requiring him to make the levy or show cause to the contrary. The remarks quoted from that case are quite applicable to, and we think decisive of, the present one. The writ of mandamus was never intended as a substitute for other remedies, but rather to afford relief in cases of clear legal right, where other remedies do not exist or are inadequate. There are unquestionably ministerial duties of a sheriff that can be enforced by mandamus, ⁴¹² as where he refuses to execute a writ of possession for specific property (*Fremont v. Crippen*, 10 Cal. 211, 70 Am. Dec. 711), but cases of this kind are clearly distinguishable from the one at bar. In the former, the plaintiff in the writ is entitled to possession of specific property, and in such case no form of action at law or in equity against the sheriff can give him adequate relief; that is, possession of the property. In this case, however, the relator is entitled to nothing but the money on his judgment, and, if the sheriff declines to collect it when it is his duty to do so, the relator has adequate remedies at law to recover damages for the respondent's refusal or neglect to perform his duties (*Love v. Williams*, 4 Fla. 126), and in such case mandamus will not lie to compel the sheriff to levy or sell: *Habersham v. Sears*, 11 Or. 431, 50 Am. Rep. 481.

Without determining whether the return of the respondent discloses a valid excuse for his failure to sell the property levied upon, we are of opinion that the alternative writ fails to show a case entitling relator to the peremptory writ. The motion to quash is, therefore, refused, and the peremptory writ denied, with costs against the relator.

MANDAMUS TO COMPEL ISSUE OR LEVY OF EXECUTION.

Although there is some conflict in the cases, undoubtedly the rule is established by the great weight of authority that the writ of mandamus will lie in favor of a person entitled to the issue or levy of an execution, and against the clerk of court or other officer whose duty it is to issue it, upon his refusal to compel him to issue it, or against a sheriff upon his refusal to levy, to compel him to levy such execution: *North Pac. Coast R. R. Co. v. Gardner*, 79 Cal. 213; *Jones v. McMahan*, 30 Tex. 720; *Hamilton v. Tutt*, 65 Cal. 57; *People v. Loucks*, 28 Cal. 69; *Garoutte v. Haley*, 104 Cal. 497; *Hayward v. Pimental*, 107 Cal. 386; *Terhune v. Barcalow*, 11 N. J. L. 38; *Laird v. Abrahams*, 15 N. J. L. 22; *State v. Vogel*, 6 Mo. App. 526; *People v. Gale*, 22 Barb. 502; *Stafford v. Union Bank*, 17 How. 275.

The issuing of an execution by a justice of the peace upon a judgment rendered by him is the exercise of a ministerial function only. It is a duty enjoined by law as resulting from his office,

and one which he may be compelled to perform by a writ of mandate: *Hamilton v. Tutt*, 65 Cal. 57; *Terhune v. Barcalow*, 11 N. J. L. 38; *Laird v. Abrahams*, 15 N. J. L. 22. Mandamus will lie to compel a clerk of court to issue an execution, where he has wrongfully refused to do so: *State v. Vogel*, 6 Mo. App. 526; *People v. Gale*, 22 Barb. 502. A clerk of a court may be compelled by mandamus to issue process for the enforcement of a judgment, notwithstanding his liability on his official bond for damages for his wrongful refusal to do so. The rule that mandamus will not lie, where the relator has another remedy, is not universally applicable, where the writ is sought against ministerial officers: *People v. Loucks*, 28 Cal. 69.

If an officer erroneously directs an execution to be returned unsatisfied, and his order is complied with, he may be compelled by mandamus to issue another execution, as his duty to do so is purely ministerial: *Hayward v. Pimental*, 107 Cal. 386; and if the condition imposed in an order granting a new trial is not complied with, the motion for such new trial must be deemed as having been denied, and, if no undertaking to stay execution has been filed, it is the duty of the county clerk to issue execution upon the request of the plaintiff, and, in case of refusal he may be compelled by writ of mandate to issue it: *Garoutte v. Haley*, 104 Cal. 497.

Mandamus will lie against the sheriff, on behalf of the wife, either abandoned by her husband, or in his absence, to compel the sheriff, who has levied upon community property, to set aside that portion which is exempt from execution: *State v. Creech*, 18 Wash. 186. The same rule applies in favor of an execution or attachment defendant against an officer who has seized exempt property and refuses to set it aside: *First Nat. Bank v. Lancaster*, 54 Neb. 467.

On the other hand, it has been maintained in several cases that the writ of mandamus will not lie to compel a clerk of court to issue, nor a sheriff to levy, a writ of execution, for the reason that the person entitled to the writ has a full and adequate remedy at law on the official bond of the officer: *Habersham v. Sears*, 11 Or. 431, 50 Am. Rep. 481.

Mandamus will not lie to compel a sheriff to levy on property the title to which is in the name of the wife of a defendant in execution, the plaintiff claiming that the property is in equity that of the defendant, and demanding of the sheriff that he levy upon it as the property of the defendant. The plaintiff has other adequate remedies both in law and equity: *State v. Craft*, 17 Fla. 722. Early cases in California maintained that mandamus would not lie against a clerk of court to compel him to issue execution on a money judgment rendered in such court, for the reason that for all damages resulting from such refusal the plaintiff has, in the ordinary course of the law, a plain, full, and adequate remedy by action on the bond of the officer: *Goodwin v. Glazer*, 10 Cal. 333; *Fulton v. Hanna*, 40 Cal. 278. As has already been shown, this rule no longer prevails in that state, as the supreme court, at a much more recent date, maintained and established exactly the contrary doctrine: *People v. Loucks*, 28 Cal. 69; *Garoutte v. Haley*, 104 Cal. 497.

WILLIAMS v. STATE.

[40 FLORIDA, 480.]

LARCENY—POSSESSION OF STOLEN GOODS AS EVIDENCE OF THEFT.—An instruction in a larceny case “that when a man is found in possession of stolen cattle, with the mark or brand changed into his, or with his mark or brand on the cattle, in the absence of a reasonable and credible explanation of these facts” an inference of guilt may be drawn, is erroneous: 1. Because it omits the legal requirement that the possession of stolen goods must be “recent” after the theft, before it can be relied upon as a basis for the presumption of guilt; and 2. Because it requires a reasonable and credible explanation from the possessor, not only of his possession of the goods, but also of an alteration of the distinguishing marks and brands on such property, before such explanation is permitted to acquit him of charge of its larceny.

LARCENY—POSSESSION AS EVIDENCE OF THEFT.—Possession of stolen property must be recent after the theft in order to impute guilt to the possessor. The presumption is stronger or weaker in proportion to the period intervening between the taking and finding, and it may be entirely removed by the lapse of such time as to render it not improbable that the goods may have been taken by another and passed to the accused.

LARCENY—POSSESSION AS EVIDENCE OF GUILT—EXPLANATION.—The presumption of guilt in larceny that the law permits to be drawn as a matter of fact from the unexplained possession of property recently stolen grows out of, and rests solely upon, the unexplained possession thereof, and not upon any alterations or mutations to which the property may have been subjected while in the defendant’s possession, or before it reached his possession, and it is error to impose upon him the duty of doing more than to reasonably and credibly explain his possession of property alleged to have been stolen, in order to remove the presumption of guilt that may arise from such possession.

Wilson & Wilson, for the appellant.

W. B. Lamar, attorney general, for the appellee.

481 TAYLOR, C. J. The plaintiff in error was convicted at the spring term, 1898, of the circuit court of De Soto county, of the crime of larceny of cattle, and from the sentence imposed seeks relief here by writ of error.

At the trial the judge, among other things, instructed the jury as follows: “That when a man is found in possession of stolen cattle, with the mark or brand changed into his, or with his mark or brand on the cattle, in the absence of a reasonable and credible explanation of those facts, you may infer that he stole them.” This charge was duly excepted to and is assigned as error. The giving of this instruction was error. It erroneously states the law as to the presumption of guilt, in cases of larceny, that may be drawn from the unexplained possession

of goods recently stolen, in that it omits that feature of the rule that requires the possession to have been "recent" after the theft, before it can be relied upon as a basis for the presumption of guilt. In the exhaustively considered case of *State v. Hodge*, 50 N. H. 510, in which it is clearly demonstrated that ⁴⁸² the presumption of guilt from the exclusive possession of property recently stolen, is not a legal presumption, but one of fact that the law permits the jury to draw, it is said: "All the cases hold that the possession must be recent, after the loss, in order to impute guilt; and this presumption is founded on the manifest reason that when goods have been taken from one person and are quickly thereafter found in the possession of another, there is a strong probability that they were taken by the latter. This probability is stronger or weaker in proportion to the period intervening between the taking and the finding; or it may be entirely removed by the lapse of such time as to render it not improbable that the goods may have been taken by another and passed to the accused, and thus wholly destroy the presumption." The same case also discusses at length the further feature of the rule, that the strength or weakness of the presumption of guilt after the lapse of time between the theft and the finding depends largely upon the character of the stolen property: *Leslie v. State*, 35 Fla. 171; *Bellamy v. State*, 35 Fla. 242. The charge is erroneous, too, in that it adds to the duty of the defendant, when found with stolen cattle in his possession, of reasonably and credibly explaining such possession, the further duty of reasonably and credibly explaining an alteration of the marks and brands thereon into the defendant's, or the presence on them of the defendant's marks and brands, before his explanation of his possession can acquit him of their larceny. The presumption of guilt in larceny that the law permits a jury to draw as a matter of fact from the unexplained possession of property recently stolen, grows out of and rests solely upon the unexplained possession thereof, and not upon any alterations or mutations to which the property may have been subjected while in the defendant's possession, or before it reached his possession. It is ⁴⁸³ true that evidence of alterations therein made by the defendant that tended to prevent identification would be pertinent and material in its bearing upon the bona fides of the explanation that he might make as to how he came into the possession, but to acquit him of the charge of larceny, when there is no other evidence of guilt than that of the possession of recently stolen

goods, the law only requires from him a prompt, reasonable, and credible explanation of his possession thereof. If such an explanation is given, and shows that he came into the possession honestly, it completely annihilates the presumption of guilt, regardless of any mutations to which he may have subjected the property while in his innocently acquired possession. If the defendant had been indicted and tried for another distinct crime inhibited by statute, that of fraudulently altering the marks and brands of animals (Rev. Stats., sec. 2474), and had been found with cattle in his possession whose marks and brands had been recently altered or changed into his, then, in the absence of prompt, reasonable, and credible explanation of such alteration or change of marks and brands, the presumption, as one of fact, could be drawn that he was guilty of a fraudulent alteration thereof: *Atzroth v. State*, 10 Fla. 207. But where the charge is larceny, as here, it is error to impose upon the defendant the duty of doing more than to reasonably and credibly explain his possession of property alleged to have been stolen, in order to remove the presumption of guilt that may arise from such possession.

There are other assignments of error, but we do not deem it necessary to consider them, except to say that the court is unanimously of the opinion that the evidence in the cause as disclosed in the record brought here is not sufficient to sustain the charge of larceny.

The judgment of the court below is reversed.

LARCENY—POSSESSION OF STOLEN PROPERTY AS EVIDENCE OF.—The possession of stolen property almost immediately after the larceny raises a presumption of guilt, which, if not rebutted, will warrant a conviction: *Huggins v. People*, 135 Ill. 243, 25 Am. St. Rep. 357. The presumption thus raised is only *prima facie* evidence of theft, and is not a legal one, but one of fact: *Stockman v. State*, 24 Tex. App. 387, 5 Am. St. Rep. 894. To raise the presumption of guilt, the possession must be recent and unexplained, when an explanation is necessary. Remote possession does not raise such presumption, nor call for explanation: *Note to Boyd v. State*, 5 Am. St. Rep. 912. To constitute evidence of theft the possession of stolen property must be recent, unexplained, and involve a distinct and conscious claim by the possessor: *Lehman v. State*, 18 Tex. Ct. App. 174, 51 Am. Rep. 298. Possession alone is not evidence of guilt, but other circumstances of guilt must be shown: *Note to People v. Levison*, 76 Am. Dec. 506. The inference of guilt may be weakened or strengthened, depending upon the length of time intervening between the theft and the finding of the goods in the possession of the accused: *Monographic note to Hunt v. Commonwealth*, 70 Am. Dec. 449. See this note, pages 447-452, for an extended discussion of the possession of stolen property as evidence of larceny.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

NORTH CHICAGO STREET RAILROAD Co. v. ZEIGER.

[182 ILLINOIS, 9.]

RAILROADS—STREET—DRIVING ON TRACK.—A person has the lawful right to drive his carriage in the tracks of a street-car company, if he exercises due care to avoid an undue interference with its rights and to avoid a collision.

DAMAGES FOR PERSONAL INJURIES—PROCURING HELP IN BUSINESS.—Where a plaintiff has been injured through the negligence of a street-car company, the expense necessary in procuring competent help in his business to do the work which would have been performed by himself had he not been disabled is a proper subject of allowance for damages, if pleaded.

APPEAL—EXCESSIVE VERDICT—SETTING ASIDE.—An appellate court will not disturb a verdict in a suit to recover for personal injuries, unless it is so excessive as to justify an inference that it is the result of partiality, prejudice, or passion.

DAMAGES—INSTRUCTIONS—INVADING PROVINCE OF JURY.—An instruction that if the jury find from a preponderance of the evidence that plaintiff is entitled to recover substantial damages, they "will" fix the amount thereof, is correct; the word "will" is not coercive, does not tend to deprive the jury of their freedom of action in the matter, and is not an invasion by the court of the province of the jury.

WITNESSES—PHYSICIANS AS EXPERTS—REFUSAL TO TESTIFY.—A physician, subpoenaed as an expert witness only, cannot refuse to testify upon the ground that no compensation greater than that allowed to ordinary witnesses has been paid or promised to him.

Action to recover for personal injuries, and for expenses to which plaintiff Zeiger was put, and for injuries to property, caused by defendant's negligence. Plaintiff was riding in a carriage, when one of defendant's cable-cars struck the carriage,

causing the injuries complained of and putting him to the expense alleged.

Egbert Jamieson and John A. Rose, for the appellant.

Lackner, Butz & Miller, for the appellee.

11 PER CURIAM. The appellate court, in deciding this case, delivered an opinion, which is, in part, as follows:

"The theory of the defendant is, that the carriage had cleared the track and was at a safe distance before the train was moved up to and partly passed it, and that, while the train was slowly moving along, the plaintiff's horse became unmanageable and backed or plunged the carriage against the train, whereby the injuries resulted. On the other hand, plaintiff's theory is, that before the carriage had fully cleared the track, and while the left hind wheel was still in the track, the car, moving with negligent rapidity, caught the wheel and shoved the carriage around until it was nearly turned about, so as to make it face in a direction nearly opposite to that in which it was going, and finally upset it, thereby occasioning the alleged injuries.

"A studious consideration of the record brings us to the conclusion that the plaintiff's theory is sustained by the preponderance and weight of evidence. The plaintiff had the lawful right to drive his carriage in the car tracks, in the exercise by him of due care to avoid an undue interference with the right of the defendant and to avoid a collision, and, while so driving, the law surrounded him with its protection against such a negligent operation by the defendant of its tracks as would inevitably lead to the injury of the plaintiff: Booth on Street Railways, sec. 316. Whether the plaintiff was in the exercise of due care, and whether the defendant was guilty of negligence, under the circumstances, were questions of fact for the jury, under the evidence, and, having been found against the defendant, with, as we have above said, the weight and preponderance of the evidence on the side of the findings, the verdict ought not to be disturbed.

12 "It cost the plaintiff one hundred and four dollars to repair the carriage, and the surgeons were paid by him four hundred and fifty dollars, and there was some other small expense, about none of which matters was there dispute. The plaintiff was a wholesale butcher and employed twenty-five men. The first time he was able to drive down to his place of business was April 4th or 5th—a little over three months after the

accident—and it was necessary for him to employ a superintendent for five months from the time of the accident, which he did at a cost of one thousand dollars for salary paid.

“The argument of defendant’s counsel against the admissibility of the testimony relative to what the plaintiff paid for a superintendent, and the necessity for employing a superintendent, is based wholly upon the original record filed in this court, and not upon the full record made in the circuit court. By a supplemental record brought here after defendant’s brief was filed, there was brought up an additional count to the declaration, which, had it been here in the first instance, would have doubtless spared the point, that there was no basis made by the pleadings for such proof. Such additional count specially alleged plaintiff’s particular damages in such respect, and the facts upon which they were claimed, and was a good basis for the evidence. The expense necessarily incurred by a plaintiff so disabled, in procuring competent help in his business to do the work which would have been performed by himself had he not been disabled, was a proper subject of allowance for damages in this character of suit: *Ashcraft v. Chapman*, 38 Conn. 230.

“An appellate tribunal will not disturb a verdict in a suit to recover for personal injuries, merely because it would have assessed the damages at a less amount if it had been sitting as a jury. It is only where the verdict in such cases is so out of the way as to justify an inference that it is the result of partiality, prejudice, or passion, that the duty of an appellate court arises to set aside the verdict. But in this record there is nothing to ¹³ be found to justify such an inference. The case seems to have been fairly and deliberately tried and full consideration given to every defense the defendant interposed, and, though the verdict is full in amount, it cannot be said to be palpably wrong.

“Error is assigned, and argued, because of the giving of two of plaintiff’s instructions, in that, as it is said, one of them, by using the word ‘will’ instead of ‘may,’ practically directs the jury to find a verdict for the plaintiff in case they find that he has proved the material allegations of his declaration by a preponderance of the evidence; and in the other it in substance tells the jury it is their ‘duty,’ in case they find the defendant guilty, to determine, from the evidence, the amount of the damages, if any, which, under the evidence, he is entitled to recover, and if the jury find, from a preponderance of the evi-

dence, that plaintiff is entitled to recover substantial damages, they 'will' (instead of 'may') fix the amount thereof, etc. In other words, as applicable to each instruction, it is argued that the words 'will' and 'duty,' as there employed, were mandatory and coercive upon the jury, and tended to deprive the jury of their freedom of action in the matter, and were, as used, an invasion by the court of the province of the jury. To tell a jury that, if they find from the evidence the plaintiff has, by a preponderance of the evidence, proved the material allegations of his declaration, their verdict 'will' (instead of 'may') be in his favor, is to state the law, and cannot, by any fair understanding of words, be an invasion of the province of the jury. 'May' could not, in such connection, properly be understood in the alternative, as 'may' or 'may not,' for, under the premise of the instruction, there was but one proper thing for the jury to do, and that was to find for the plaintiff. Had the word 'may' been used instead of 'will,' it would have stood for and meant the same thing as 'will,' if rightly understood by the jury.

14 "Very much the same reasoning applies to the use of the words 'duty' and 'will,' in the connection in which they were used in the second instruction, and it is unnecessary to elaborate upon it. The cases cited and relied upon by appellant in this connection are not, as we understand them, parallel to this one, and our holding is in no sense inconsistent with them, but, on the other hand, is in harmony with them.

"While it is exceedingly important and vitally essential to the preservation of the right of trial by jury that the jury's province should not be usurped by the trial judge, it is no less important and essential that the functions of the judge should be preserved and exercised, and to instruct the jury as to what the law demands of them when all the facts and conditions precedent to the demand of the law have been rightfully found by the jury to exist, can, in our view, never be error. For illustration we refer to *Chicago etc. R. R. Co. v. Payne*, 59 Ill. 534, *Aurora v. Hillman*, 90 Ill. 61, and there are many others.

"Neither was there error in the refusal of defendant's instruction numbered 28, that the law will not require an expert witness (a physician and surgeon in this case) to testify in a case unless he is paid the usual fees of expert witnesses of his class and character, etc. This question has lately been settled by our supreme court in *Dixon v. People*, 168 Ill. 179, holding that a physician, subpoenaed and interrogated as an expert witness only, cannot refuse to testify, in either a civil or criminal

suit, upon the ground that no compensation greater than that allowed to ordinary witnesses has been paid or promised to him.

"We perceive no reversible error upon the record, and the judgment of the circuit court is affirmed."

We concur in the conclusion reached by the appellate court, and in the views expressed by them as above quoted. Accordingly, the judgment of the appellate court is affirmed.

STREET RAILWAYS—DRIVING ON TRACK.—A traveler on a city street has a right to drive his vehicle either upon or across the track of a street railway company, with this limitation that he must not interfere unnecessarily with the passage of the cars: Note to Thatcher v. Central Traction Co., 45 Am. St. Rep. 649.

DAMAGES—EXCESSIVE VERDICT.—A verdict of a jury will not be disturbed on account of excessive damages, unless they are so outrageous as to induce the court to believe that the jury must have acted from prejudice, partiality, or corruption: Frankfort v. Coleman, 19 Ind. App. 368, 65 Am. St. Rep. 412, and note.

DAMAGES FOR PERSONAL INJURIES MAY INCLUDE the loss of wages of the injured person for the time he was prevented from working, and compensation for being deprived of following such business as he could have engaged in but for his injuries: Richmond etc. Ry. Co. v. Norment, 84 Va. 167 10 Am. St. Rep. 827.

WITNESS—FEES OF EXPERTS.—A professional or expert witness may be compelled to attend court and to testify on a criminal trial respecting any fact within his knowledge, though it is one acquired by study and experience, and he cannot recover any fees in excess of those recoverable by other witnesses: Flinn v. Prairie County, 60 Ark. 204, 46 Am. St. Rep. 168, and note.

FOREST CITY INSURANCE COMPANY v. HARDESTY.

[182 ILLINOIS, 89.]

CONTRACTS.—FORFEITURES are not favored either in equity or in law; consequently, provisions for forfeiture are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced.

INSURANCE POLICY—CONSTRUCTION.—If a clause in an insurance policy is susceptible of two interpretations, that will be adopted which is most favorable to the insured, in order to indemnify him for the loss which he has sustained.

INSURANCE—FIRE—CHANGE OF TITLE—DEATH OF INSURED.—Under an insurance policy which contains a clause that "if any change takes place in the title" in the property the policy shall be void, the death of the insured does not work such a change of title as to make the policy void.

INSURANCE—FIRE—ACTION BY ADMINISTRATOR OF INSURED.—Where, by the terms of an insurance policy, the company agrees to "make good unto the said assured, his executors, administrators, and assigns" all such loss or damage as shall happen

by fire, an administrator may maintain an action on the policy to recover for a loss occurring after the death of the insured.

Webb & Lane and Conkling & Grout, for the appellant.

A. M. Wilson and Stelle, Walker & Cross, for the appellee.

44 MAGRUDER, J. The policy of insurance in this case contains, among other conditions, the following condition: "If any change takes place in the title, possession, or interest of the assured in the above-mentioned property, . . . this policy shall be void." The insurance company agrees to make good the loss during a period of five years from January 21, 1892, to January 21, 1897. The assured, Henry Hardesty, died on April 16, 1894, and the fire, which destroyed the dwelling-houses, occurred on November 28, 1895. The death of the assured and the loss both occurred within the five years. The loss of the property by fire occurred, however, after the death of the assured. Upon this statement of facts, the appellant contends that the death of the assured, thus occurring before the loss, worked such a change of title and possession in the property insured as to make the policy of insurance void; and that, therefore, the appellant is not liable in this action.

The contention of the appellant assumes that the words, "change of title," as used in the policy, refer to and include the involuntary change of title caused by the death of the assured. The question, therefore, to be determined is whether, under the language of this policy and the facts of this case, the death of the assured caused such a change of title in the property insured, as to make the policy void.

45 Those portions of the clause, in which the condition, containing the words, "change of title," occurs, refer to voluntary acts on the part of the assured himself. The policy is to be void if the assured obtains other insurance without the consent of the company. The policy is to be void if the buildings are used for other purposes than those mentioned therein, or are allowed to become vacant or unoccupied. The policy is to be void if the risk is increased by the erection of adjacent buildings, or by any other means whatever. The policy is to be void if any encumbrance is placed upon the property without the consent of the company, or if the policy is assigned without such consent, or if foreclosure proceedings are commenced, or if the assured fails to make known any facts material to the risk. All the acts specified in these various conditions are such acts as may or may not be

done or caused by the assured party or parties, or may or may not be omitted or refrained from by such party or parties. If the condition in question be construed with reference to and in connection with the other conditions it would seem to follow that forfeiture was to be worked by some voluntary act of the assured.

The condition, which provides that, if any change takes place in the title of the assured, the policy shall be void, is a condition which provides for a forfeiture. In other words, the assured party is to submit to a forfeiture of his right of action, if any change takes place in the title. It is a well-settled rule that forfeitures are not favored either in equity or in law. Consequently, provisions for forfeiture are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced: *Webster v. Dwelling House Ins. Co.*, 53 Ohio St. 558, 53 Am. St. Rep. 658. It would seem to be unjust and inequitable that a forfeiture should be enforced because of an act for which the assured is not responsible, and which is in no way his fault. It would be proper to hold the assured responsible for any act of forfeiture which is ⁴⁶ within his control. There is no claim here that the death, which caused the change of title, was the result of suicide, or of any improper conduct on the part of the assured.

The change in title by death of the assured does not seem to have been contemplated by either party to the contract of insurance. Hence, although the words "change of title" may be broad enough to include the change worked by death, yet the assured will not be bound by such construction. In *Bailey v. De Crispigny*, L. R. 4 Q. B. 185, it was said: "Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterward happens."

Whether or not the words, "change of title," as used in this policy, refer to a voluntary act on the part of the assured, or to an involuntary act like death, is, to say the least, a matter of doubt, and involves a question of doubtful construction. Where the words in a contract of insurance are so framed as to leave room for construction, the courts are inclined to lean against that construction which will impair the indemnity of the assured. If the clause in a policy is susceptible of two interpre-

tations, that one will be adopted which is most favorable to the assured, in order to indemnify him for the loss which he has sustained: *Illinois Mut. Ins. Co. v. Hoffman*, 31 Ill. App. 295. In *Commercial Ins. Co. v. Robinson*, 64 Ill. 265, 16 Am. Rep. 557, we said: "Equivocal expressions in a policy of insurance, whereby it is sought to narrow the range of the obligations these companies profess to assume, are to be interpreted most strongly against the company": *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644; *Schroeder v. Trade Ins. Co.*, 109 Ill. 157. "The predominant intention of the parties in a contract of insurance is indemnity, and this intention is to be kept in view and favored in ⁴⁷ putting a construction upon the policy": 1 *Phillips on Insurance*, sec. 124. Hence, the contract is always to be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity: *Healey v. Mutual Acc. Assn.*, 133 Ill. 556, 23 Am. St. Rep. 637. "It is a rule of law, as well as of ethics, that, when the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee": *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 413, 88 Am. Dec. 337. These rules of construction are applied to provisions and conditions in policies of insurance, because such policies are prepared by the companies themselves, and the language, in which they express their obligations and limit their liabilities, is selected by them, and not by the insured parties: *Commercial Ins. Co. v. Robinson*, 64 Ill. 265, 16 Am. Rep. 557; *Webster v. Dwelling House Ins. Co.*, 53 Ohio St. 558, 53 Am. St. Rep. 658.

It is said, however, by the appellant, that the policy here in question insured Henry Hardesty only, and not his executors and administrators; and that, therefore, inasmuch as the loss occurred after his death, his administrator has no right to sue for a recovery of the amount of the loss. By the terms of the policy, the company agrees to "make good unto the said assured, his executors, administrators, and assigns, all such immediate loss or damage . . . as shall happen by fire . . . from the twenty-first day of January, 1892, at noon, to the twenty-first day of January, 1897, at noon." Here, certainly, is an agreement to make the loss good, not only to the assured, but also to his "executors, administrators, and assigns"; and not only so, but to make it good for the whole period of five years, during which both the death and the loss occurred. It is true that the policy does not say, in so many words, that the company

insures Henry Hardesty and his executors, administrators, and assigns, but the clause which contains the agreement to make the loss good to the latter is so intimately connected ⁴⁸ with the prior clause which insures Henry Hardesty that the two clauses must be construed together. If the first clause is to stand entirely alone, then it fails to specify any time during which the insurance is to run. The words specifying the period of five years are used in connection with the clause containing the words "executors, administrators, and assigns," but must also be held to apply to the earlier clause.

The construction insisted upon by the appellant is that in case the loss had happened before the death of Henry Hardesty, the right of action would survive to his executors and administrators, but that, the loss having occurred after his death, there was no right of action in his administrator. We are unable to concur in this view. The company agrees to make good the loss to the insured and his executors and administrators during a period of five years, irrespective of the question whether the loss should occur before or after the death of the assured. The plain meaning of the policy justifies the present action by the administrator. If the reference was only to the loss which should occur during the life of the assured, the use of the words "executors and administrators" would be unnecessary, as, in such case, the administrator would have a right of action under the law, and independently of any provision in the policy. The clauses of this policy are evidently framed so as to preserve the interests of the company, and yet not one of them refers to any such contingency as the death of the assured, except so far as may be inferred from the use of the words "executors and administrators." As the company agrees to make good the loss during five years to the executors and administrators, as well as to the assured, it must be held to be liable to such administrator as there might be during the period of five years. No administrator could be appointed during that period, unless the deceased had died during that time, and no loss could be made good during that time, unless such loss occurred during that time.

⁴⁹ We are aware that there is some conflict of authority on this question in the decisions of the courts; but we prefer to follow those authorities which are in harmony with the view above expressed, that is, that the death of the insured under the language of the policy here does not work such change of title as to make the policy void.

In *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88, the second condition in a policy of insurance was as follows: "And if the title of the property is transferred or changed, and the policy is assigned without written permission hereon, the policy shall be void"; and in construing that condition the court of appeals of Virginia said: "The third instruction refers to condition 2. The court gave it with the construction that the change interdicted by the condition was not intended to include devolution of title upon the heirs by the death of the assured. In this surely there was no error. By the change of title provided against in the condition must have been intended a voluntary disposition or alienation of the property. It could not have been intended to embrace all kinds of transfer of title. . . . It is to the last degree unreasonable to suppose that any sane man would ever accept a policy of insurance against loss by fire, if he understood it, which contained a provision for immediate forfeiture by reason of his death and consequent descent of title to his heirs": *Burbank v. Rockingham Mut. Fire Ins. Co.*, 24 N. H. 550, 57 Am. Rep. 300.

In *Richardson v. German Ins. Co. of Freeport*, 89 Ky. 571, the action was upon a policy of insurance against loss by fire, which was almost identical in its terms and provisions with the policy in this case. The assured died; and the principal question was, whether the policy became void by reason of the death of the assured, which occurred before the destruction of the property. In that case, the court of appeals of Kentucky held that a forfeiting clause in a contract of insurance should never defeat a right previously agreed upon and provided for, unless the language ⁵⁰ strictly interpreted, requires it; that a policy of fire insurance does not become void on the death of the assured; that a provision in the policy that it shall become void "if any change takes place in the title" does not apply to such a case as is shown by the undertaking of the company to make good the loss to the "assured, his executors, administrators, and assigns." In the opinion of the court in the Kentucky case it was said that, by the language used, the property was insured for a specified period of time; and that the company "agreed in express terms to make good unto, not merely the insured himself, but as well his executors, administrators, and assigns, the immediate loss or damage that might happen to the property at any time during that period, whether before or after his death; and, therefore, to treat that event as, ipso facto, a termination of the policy and liability under it would be contrary

to the express terms of it, render the stipulation for payment to the personal representative of the insured superfluous, and allow the company to retain the full consideration paid, while being held to only part performance of its agreement." The court there further said that the clause, "or any change takes place in the title, use, or occupation or possession thereof whatsoever," "does not necessarily or properly refer to a change unavoidably resulting from his death, but rather to such as might be caused or suffered by act of the assured while living." In that case, also, the court of appeals of Kentucky refused to follow the cases of *Sherwood v. Agricultural Ins. Co.*, 73 N. Y. 447, 29 Am. Rep. 180, and *Wyman v. Wyman*, 26 N. Y. 253. Counsel for the appellant press upon our attention the reasoning of the court of appeals of New York in two cases decided in that state upon this subject. The doctrine of these New York cases has been referred to with approval in a number of text-books upon insurance, and our attention is also called to the language of these text-books. The principal New York cases thus referred to are *Sherwood v. Agricultural Ins. Co.*, 73 N. Y. 447, 29 Am. Rep. 180, ⁵¹ and *Matter of Hine v. Woolworth*, 93 N. Y. 75, 45 Am. Rep. 176. A reference to these two cases will show that the conditions in the policies there, which provided for a forfeiture in case there should be a change of title, contained the words, "by operation of law." In the *Sherwood* case the condition was as follows: "If . . . the said property shall be sold or conveyed, or the interest of the parties therein be changed in any manner, whether by act of the parties or by operation of law, . . . this policy shall be null and void." In the *Woolworth* case, the court says: "The policy contained a condition that, if the property insured should be sold or conveyed, or if the interest of the insured therein shall be changed in any manner, whether by act of the insured or by operation of law, the policy should be null and void," etc. The two New York cases, thus mainly relied upon, are distinguishable from the case at bar by the use of the words "by operation of law" in the policies, because those words necessarily refer to a change of title resulting from the operation of the statute of descents by reason of the death of the assured party. So far as the views of the New York cases go beyond the language of the policies, as thus indicated, and are opposed to the views expressed in the *Virginia* and *Kentucky* cases, we are not disposed to adopt them. So far as the case of *Wyman v. Wyman*, 26 N. Y. 253, is concerned, the condition there was against a

transfer of the interest of the assured in the policy, and not against a change of interest in the property insured; and the decision of the court was based upon that distinction: *Sherwood v. Agricultural Ins. Co.*, 73 N. Y. 447, 29 Am. Rep. 180. In reference to the case of *Lappin v. Charter Oak Fire etc. Ins. Co.*, 58 Barb. 325, it may be said that the decision in that case was not rendered by a court of last resort, and is based largely upon the decision of the New York court of appeals in *Wyman v. Wyman*, 26 N. Y. 253, which the lower court felt itself bound to follow.

⁵² Our conclusion is, that the death of Henry Hardesty on April 16, 1894, more than a year before the fire occurred which destroyed the property insured, did not, under the facts of this case and under the provisions of the policy here sued upon, work such a change of title and possession in the property insured, as to make the policy void; and that the decisions of the lower courts are correct.

Accordingly, the judgment of the appellate court is affirmed.

INSURANCE—CONSTRUCTION OF POLICY.—Insurance policies must be liberally construed in favor of the assured, so as not to defeat without a plain necessity his claim for indemnity; and where words are capable of two interpretations, that which will sustain the claim and cover the loss should be adopted: *Berliner v. Travellers' Ins. Co.*, 121 Cal. 458, 66 Am. St. Rep. 49, and note; *Matthews v. American Central Ins. Co.*, 154 N. Y. 449, 61 Am. St. Rep. 627 and note.

INSURANCE.—FORFEITURES are not favored in the law, and courts are reluctant to declare and enforce them if, by reasonable interpretation, it can be avoided: *Coleman v. Insurance Co.*, 49 Ohio St. 310, 34 Am. St. Rep. 565; *Dover Co. v. American Fire Ins. Co.*, 1 Marv. (Del.) 32, 65 Am. St. Rep. 264.

INSURANCE — CONDITIONS AGAINST ALIENATION. — **DEATH** of the assured and the consequent charge and control of his property by his administrator, or by descent to his heirs, does not avoid a policy of insurance conditioned to become void upon alienation of the insured property: *Burbank v. Rockingham Ins. Co.*, 24 N. H. 550, 57 Am. Dec. 300, and note. In this connection, see *Matthews v. American Central Ins. Co.*, 154 N. Y. 449, 61 Am. St. Rep. 627.

KINGMAN v. MOWRY.

[182 ILLINOIS, 256.]

PLEADING—ANSWER—WHEN DEEMED TRUE.—When a cause is submitted to a court for decision upon bill and answer, the answer is accepted as true if its averments are not challenged by a replication.

FRAUDULENT CONVEYANCES—NECESSITY OF INTENT.—Where the legal effect of a conveyance is to work a fraud on the rights of creditors, it will be deemed fraudulent as an inference of law, without regard to the motives which prompted it.

FRAUDULENT CONVEYANCES—ORGANIZING CORPORATION AND TRANSFERRING PROPERTY TO IT.—The formation of a corporation by a debtor, and the conveyance of all his property thereto, is not fraudulent in fact or as a matter of law, if made in good faith after notice to all his creditors and with the consent and approval of most of them, and where the debtor retains the ownership of the stock which is equally open to seizure and sale on execution as was the transferred property.

FRAUDULENT CONVEYANCES—CHANGE OF PROPERTY INTO STOCK INTEREST.—A mere change by a debtor of his property into a stock interest in a corporation is not fraudulent in legal contemplation merely because it compels a creditor to levy upon and sell the stock interests of the debtor instead of the property which he has conveyed.

FRAUDULENT CONVEYANCES—BORROWING MONEY—PLEDGE TO SECURE.—A debtor may borrow money wherewith to discharge his bona fide indebtedness, and may pledge corporate stock to secure the party loaning the money.

Creditor's bill against defendant to set aside certain transactions alleged to be in fraud of the plaintiff's rights as the owner of two judgments against defendant on which executions had been returned nulla bona.

Arthur Keithley, for the appellant.

Dunham & Foster, for the appellees.

²⁶⁰ **BOGGS, J.** The truth of the averments of the answer was not challenged by replication, but the cause was submitted to the court for decision upon bill and answer. The answer was, therefore, to be accepted as true: *Pankey v. Raum*, 51 Ill. 88; *Fordyce v. Shriver*, 115 Ill. 530; *County of Cook v. Great Western R. R. Co.*, 119 Ill. 218.

It appears indisputably from the facts set forth in or by the answer the transaction here sought to be invalidated was entered into and executed in actual good faith and without any desire to defraud creditors. If, however, its legal effect was to work a fraud on the rights of the appellant as a creditor, it will be deemed fraudulent as an inference of law, without re-

gard to the motives which prompted it: *Lawson v. Funk*, 108 Ill. 502.

The contention of appellant is, the transfer by a debtor of his property to a corporation necessarily hinders and delays the creditor in the collection of his debts, and is in all instances a fraud, in legal contemplation. Adjudged ²⁶¹ cases are cited as in support of this position. We have examined these cases, and while such transactions were condemned in the instances then under consideration, we do not understand it is to be deduced from them that it is a fixed rule of law that the formation of a corporation by the debtor, and the conveyance of all his property to the corporation, though made in actual good faith, is conclusively presumed to be fraudulent as a matter of law. One of such cases (*Bennett v. Minott*, 28 Or. 339) held to quote from the opinion: "When a debtor, for the purpose of hindering and delaying creditors, organizes a corporation and transfers to it all his assets, he himself being the owner of practically all the corporate stock, and continuing the business the same after as before the incorporation, using the proceeds for his own benefit, equity will set aside such transfer at the instance of creditors, notwithstanding the incorporation is valid, and the corporate stock subscribed by the debtor is subject to sale under execution." And in another (*Kellogg v. Bank*, 58 Kan. 43, 62 Am. St. Rep. 596), it was said: "A fraud may be perpetrated by an insolvent merchant through the instrumentality of a corporation organized and controlled by himself, to which he transfers the bulk of his property, as well as by a transfer to an individual; and where it appears that this has been done for the purpose of hindering and delaying creditors, and enabling the debtor to retain the management and control of his property and of depriving his creditors of an opportunity to collect their dues, and when such insolvent retains substantially all the stock in the corporation, and no innocent person contributes any substantial sum to its assets, the court, in sustaining attachments levied on the property and directing the sale thereof to satisfy the claims of creditors, is warranted in treating the whole transaction as a sham."

Expressions of the court in *First Nat. Bank v. Trebein*, 59 Ohio St. 316 (the case most relied on), give some support to the view entertained by counsel for appellant, ²⁶² but in that case it was said: "The formation of the corporation in no way facilitated the transaction of his [the debtor's] milling business and that connected with it. Nothing was added to his capital, un-

less we regard the few hundred dollars that may have been paid for the four shares of stock taken by the other members of his family such an addition. Evidently an addition to capital was not the controlling object. . . . The only purpose the creation of the corporation and the conveyance to it subserved was to hinder creditors in levying upon the property and selling it on execution at law; and it is this hindrance the law will not permit, and, when ascertained in a proper proceeding, requires the conveyance to be set aside and the property administered for the benefit of all the creditors of the fraudulent grantors. . . . We are clearly satisfied that the conveyance by Trebein of his property to the corporation was made to hinder and delay creditors, and should have been so declared by the court."

It is believed that in each of the cases relied upon some circumstance of fraudulent intent, as the reservation of a trust in favor of the debtor, the design to create and administer the corporation for the mere purpose of enabling the debtor to conduct his business under the guise of a corporation and escape, even temporarily, his creditors, or some improper disposition or manipulation of the stock interest of the debtor to the injury of his creditors, or other like consideration, determined the action of the court. Certainly, if such a conveyance be made with the consent and approval of all the creditors, it would be valid. If, as here, entered into after notice to all the creditors and with the consent and approval of the greater number of them, as being the most desirable method of conserving the interests of all without any purpose or design of defrauding any creditor, and the debtor retains the open ownership of a stock interest based upon the value of the property conveyed, and ²⁶³ equally open, as was such property, to seizure and sale on execution against the debtor as was the transferred property, the transaction cannot be deemed fraudulent, either in fact or as a matter of law.

It is urged the transaction is fraudulent in law, for the reason, if effectual, it prevents appellant, as a creditor, from seizing the property which the debtor owned and conveyed to the corporation, and forces the appellant to levy upon and sell the stock interests of the debtor instead. The appellant had no lien upon the property, nor any right to demand the debtor should refrain from making any disposition of the same which his judgment and discretion, fairly and justly exercised, would dictate as proper and advisable in view of the rights and in-

terests of his creditors and the situation and circumstances of his estate, provided the result of such action on the part of the debtor should leave the proceeds of the transaction still subject to the process provided by law for the collection of judgments. The law has no universal rule that a mere change of the property into a stock interest in a corporation must be denounced a fraud in legal contemplation, though it may be clearly seen it is not so in fact. The operations of a debtor in dealing with his property may so change its character as to make it more inconvenient to levy upon and sell the same under execution without subjecting the debtor, as matter of law or fact, to the charge he has fraudulently hindered and delayed his creditors in the collection of their debts. Pledging the stock to Ainsworth to secure the money advanced by the latter was not a fraudulent act. The debtor had the right to borrow money wherewith to discharge his bona fide indebtedness and to secure the party loaning the money by the assignment of his shares of stock.

The judgment of the appellate court is correct and is affirmed.

PLEADING.—AN ANSWER IS TAKEN AS TRUE. If no replication is filed: *Trout v. Emmons*, 29 Ill. 433, 81 Am. Dec. 326, and note.

FRAUDULENT CONVEYANCES—PRESUMPTION OF INTENT.—When an act done will necessarily have the effect of hindering and delaying creditors, the law presumes that it was done with fraudulent purpose and intent: *Harting v. Jockers*, 136 Ill. 627, 29 Am. St. Rep. 341; *Hanson v. Bean*, 51 Minn. 546, 38 Am. St. Rep. 516. The existence of fraud is often a presumption of law, from admitted or established facts, irrespective of motive: *Belford v. Crane*, 16 N. J. Eq. 265, 84 Am. Dec. 155, and note; *Hundley v. Webb*, 3 J. J. Marsh. 644, 20 Am. Dec. 189.

FRAUDULENT CONVEYANCES.—IF A DEBTOR ORGANIZES A CORPORATION and transfers his property to it for the purpose of shielding himself from his creditors, the property so transferred being the chief part of his assets, and the corporators being members of his family, the transfer is fraudulent, and may be avoided by his creditors: *Kellogg v. Douglas County Bank*, 58 Kan. 43, 62 Am. St. Rep. 596. On voluntary and fraudulent conveyances, see monographic notes to *Hagerman v. Buchanan*, 14 Am. St. Rep. 739-754; *Crawford v. Kirksey*, 28 Am. Rep. 721-723; *Jenkins v. Clement*, 14 Am. Dec. 703-709.

WEAVER v. WEAVER.

[182 ILLINOIS, 287.]

GIFTS—DELIVERY OF INSTRUMENT.—While a delivery may be by words, acts, or both combined, it is indispensable, whatever means may be adopted, that the deed pass beyond the dominion and control of the donor; otherwise, it cannot be said to come within the power and control of the donee.

GIFTS—INSURANCE POLICY—DELIVERY TO THIRD PERSON.—The delivery of a copy of an assignment of an insurance policy to an agent of the company, in compliance with a condition in the policy, does not constitute a delivery to the company for the benefit of the assignee.

GIFTS—INSURANCE POLICY—DELIVERY.—The execution of an assignment of an insurance policy to one's mother, and a promise to keep such assignment and policy for her, is not such a parting with the control of the policy and the assignment as will constitute a valid delivery or deprive the son of the power to make a subsequent assignment to his wife.

TRUSTS—IMPERFECT GIFT AS—INSURANCE POLICY.—A trust in an insurance policy cannot be deduced from an imperfect gift thereof.

Rogers & Mahoney and Frederick A. Willoughby, for the appellant.

Holden & Buzzell and William H. Holden, for the appellee.

289 WILKIN, J. The parties to this litigation were interpleaders in the circuit court of Cook county upon the petition of the Aetna Life Insurance Company, each claiming the benefit of a policy of insurance upon the life of Edward L. Weaver, procured December 20, 1882. He died May 9, 1896, leaving appellant, his widow, and appellee, his mother, surviving him. The policy provided that "no assignment of this policy shall be valid unless made in **290** writing and attached hereto and a copy thereof furnished said company; and any claim against this company arising under this policy, made by any assignee, shall be subject to proof of interest." On October 8, 1892, about one year after his marriage to appellant, insured went to the office of the company in Chicago and there filled out in duplicate an assignment to his mother, as follows:

"For value received I hereby transfer, assign, and turn over unto Mary W. Weaver, mother, all my right, title, and interest in policy of life insurance No. 35,856, issued by the Aetna Life Insurance Company of Hartford, Conn., and all benefit and advantage to be derived therefrom.

"Witness my hand and seal at Chicago, state of Illinois, this eighth day of October, 1892.

"EDWARD L. WEAVER. [Seal.]"

This he acknowledged before a notary public on that day, and left one copy with the agent of the company, and took the other, with the policy, to his home. A short time previous to his death (May 9, 1896), he made another assignment to appellant, one copy of which was attached to the policy and delivered by him to her; the other she caused to be delivered to the company some days after his death.

Upon a hearing in the circuit court a finding and decree were rendered in favor of the wife, which, on appeal to the appellate court for the first district, was reversed for error in the exclusion of evidence, and the cause was remanded for further proceedings. On a second hearing the chancellor again found for the wife, and entered a decree in her favor, but that decree has been reversed by the appellate court and the cause remanded, with directions to enter a decree in favor of the mother. To reverse that judgment the wife prosecutes this appeal.

Both assignments are admitted by all parties to have been intended by the assignor as mere gifts. The contention on behalf of the mother, in the circuit and appellate courts and here is, that the assignment to her was a perfected gift and the power of the insured to thereafter ²⁹¹ make an assignment of it exhausted; or, as it is sometimes expressed, after that assignment he was no longer in loco poenitentiae. And this position, though overruled by the circuit court, has been sustained by the appellate court. The correctness of the contention depends upon whether or not there was such a delivery of the assignment as to put the control of it and the policy out of the power of the assignor during the remainder of his life. It is conceded, as clearly it must be, that unless there was such delivery the gift to the mother was not so perfected inter vivos as to give it validity as against the second assignment, and, on the other hand, it is not denied that if the first assignment was so far completed as to become a valid and binding gift upon the part of the donor, then the second subsequent gift to the wife is invalid for want of power to make it.

Turning, then, to the vital question in the case, was there a delivery of the assignment of October 8, 1892, to the mother? No controversy is made upon the proposition that an actual, manual delivery was not necessary, but it is admitted by counsel for appellant that a good delivery may be made by acts without words, by words without acts, or by both; that a delivery may be legally made to a third person for the benefit of a grantee, or, as in this case, the assignee. The usual mode of delivery

is the mutual transfer from the grantor to the grantee. But it is too well understood to call for the citation of authorities that the declarations and conduct of the grantor in relation to the instrument may be such as to become equivalent to such actual delivery, and in every such case the crucial test is the intent with which the acts or declarations were made, and that intent is to be ascertained from the conduct of the parties, particularly the grantor, and all the surrounding circumstances of the transaction: *Weber v. Christen*, 121 Ill. 91, 2 Am. St. Rep. 68. "Delivery is by words, acts, or both combined, by which a grantor expresses a present intention to divest himself of title to ²⁹² property described in a proper deed. No particular form of delivery is required. A deed may be manually given by the grantor to the grantee, yet manual delivery is unnecessary. The real test of delivery is this: Did the grantor, by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered": 9 Am. & Eng. Ency. of Law, 2d ed., 153, 154; citing *Weber v. Christen*, 121 Ill. 91, 2 Am. St. Rep. 68, and other Illinois decisions to like effect.

In *Provart v. Harris*, 150 Ill. 40, 47, after citing authorities as to what will constitute a good delivery, we said: "While it may not be essential in all cases that the deed should be delivered into the actual possession of the grantee (*Gunnell v. Cockerill*, 79 Ill. 79), it is indispensable, whatever means may be adopted to accomplish its delivery, that the deed pass beyond the dominion and control of the grantor, for otherwise it cannot be correctly said to come within the power and control of the grantee. Their interests are diametrically opposed. Both cannot, consistently with its objects, have control of the deed at the same time, and until the grantor parts with all control over it that of the grantee does not attach: *Cases supra*. It is absolutely essential that the acts done or words spoken, or both, shall clearly manifest an intention on his part that the deed shall presently become operative to convey the estate therein described to the grantee, and that he has parted with all power of control and dominion over it (*Bryan v. Wash*, 2 Gilm. 557), for, as we have seen, if the grantor retains dominion and control over it, the deed is ineffectual for any purpose as a conveyance. In *Cook v. Brown*, 34 N. H. 460, the court, in passing upon this point, there said: 'To make the delivery good and effectual, the power of dominion over the deed must be parted with. Until then the instrument passes nothing. It is merely ambulatory and gives no title. . . . So long as it

is in the hands of a depositary, subject to be recalled by the grantor at any time, the grantee has no right to it and can acquire ²⁹³ none, and if the grantor dies without parting with his control over the deed it has not been delivered during his life, and after his decease no one can have the power to deliver it.' In *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592, it was said: 'To constitute delivery, good for any purpose, the grantor must divest himself of all power and dominion over the deed. . . . An essential characteristic and indispensable feature of every delivery, whether absolute or conditional, is, that there must be a parting with the possession and of the power and control over the deed by the grantor, for the benefit of the grantee, at the time of delivery.' While the doctrine announced in these cases has not been universally adopted (1 Devlin on Deeds, sec. 283), it is supported by the great current of authority": Citing authorities. In *Walter v. Way*, 170 Ill. 96, 99, we again said: "It has also been said that a delivery may be by acts or words, or by both, or by one without the other. But it is well settled that several things are necessary to constitute a valid or effective delivery of a deed. One of the essential requisites of a sufficient delivery is, that the deed pass beyond the dominion and control of the grantor": Citing with approval *Provart v. Harris*, 150 Ill. 40. To the same effect is *Hawes v. Hawes*, 177 Ill. 409.

Here there is no claim that there was an actual delivery of the deed of assignment to Mary W. Weaver, the appellee, but it is insisted that the leaving of one of the duplicate copies with the agent of the insurance company amounted to a delivery to a third person for her benefit. This position cannot be sustained. We think it clear, from all the facts in the case, that the only purpose of the insured in leaving that copy with the company was to comply with the condition in the policy requiring, in case of an assignment, a copy thereof to be furnished to the company.

The case of *Hurlbut v. Hurlbut*, 49 Hun, 189, relied upon by counsel for appellee as an authority sustaining their ²⁹⁴ contention on this point, is distinguishable from this case in that particular—at least, there is nothing in the case as reported to show that there was a condition in the policy that the company should be furnished with a copy of any assignment to make it valid. It was perfectly consistent with all the facts in that case to hold that the delivery to the agency of the company was with the intent to presently divest the title of the

father and transfer it to the daughter, whereas here it is altogether consistent with the facts that the duplicate was placed in the hands of the agent solely for the purpose of taking one step, made necessary by the policy, to finally consummate the transfer. The declarations of the assured, proved by appellee herself, to the effect that he would retain the policy and assignment for her, are inconsistent with the claim that by the delivery of the copy he intended that a third party should hold it for her benefit. The fact that the copy was executed, acknowledged, and left with the company is, of course, a circumstance tending to show, with all the other facts of the case, that there was a purpose, at the time, to make a complete gift to the assignee, but it was not, of itself, a valid delivery. And *Williams v. Chamberlain*, 165 Ill. 210, goes no further than this.

But it is insisted that the acts and declarations of the insured were equivalent to a delivery to the assignee herself. It appears from the testimony of Mr. Snow, a brother in law of the deceased, that on the day the blanks were filled up and executed at the office of the company, and after they were completed and a copy left with the agent, deceased directed him to inform his mother that he "had assigned his policy of life insurance in the Aetna Life Insurance Company, of two thousand dollars, to her, and he would keep the policy and assignment for her." This witness also testified that that evening, at his house, the mother being present (she then living with him), he delivered that message, to which she replied, in substance, that it was very ²⁹⁵ kind in her son. The wife of Snow, sister of deceased, also testified to the delivery of the message and the reply of the mother. Subsequently, all the parties met in California, where the insured resided for a time for his health, and Snow, his wife, and appellee all testify to conversations there, some of which were as late as in the winter of 1895, in which the deceased stated that he had assigned the policy to his mother, and she testifies that he at one time told her that he would keep it for her. This testimony, considered most favorably to the appellee, merely amounts to saying that he made the assignment, retained possession of it, and sent word to his mother that he had made it and that he would "keep it for her." There is no evidence in this record to the effect that the assignment was ever attached to the policy, and the proof shows that it was never seen after the assured took it from the office of the company. At the time of the assignment to the wife the policy was found in a tin box in the trunk of the assured, and no as-

assignment was attached to or found with it. Certainly, under the testimony of Snow, his wife, and appellee, it cannot be said the assured ever parted with the dominion and control over the instrument, unless it must be held that he did so by the declaration or promise that he would keep it for the assignee.

It has been held that there could be no valid delivery of a deed so long as it remained in the possession and control of the maker. While the rule is not uniform, no case has been found which holds, nor can we conceive that it could be held, that a deed retained by the grantor for the grantee would ever be equivalent to a delivery, unless it was clearly shown that he retained it under such circumstances as would estop him from making any other disposition of it subsequently. That Edward L. retained the physical control of this assignment cannot be questioned. That he had it in his power to destroy it (and we think it fairly inferable that he did do so) is clear. The promise that he would keep it for his mother ²⁹⁶ was without consideration, the transfer being a mere gift, and no one will claim that she could, at any time, by any means, have compelled the fulfillment of that promise. Had he the next day, or at any time subsequent to the execution of the instrument, seen proper to inform his mother that he had changed his mind and determined not to keep it for her, will it be seriously contended that she could have prevented the carrying out of that determination? If so, upon what principle and by what means? It may be said that, morally, it was wrong that he should deceive her by his conduct and declarations, but he was guilty of no legal wrong for which the law affords a remedy. The charitable view, however, and one not inconsistent with the facts, to our minds, is, that while he at different times had it in his mind to give the policy to his mother, he never understood that he had absolutely done so, and that, putting his own construction on his acts and declarations, he never intended to foreclose himself of the right to leave it to his estate or give it to his wife if circumstances, in his judgment subsequently justified it. In the very case of *Otis v. Beckwith*, 49 Ill. 121, so much relied upon by counsel for appellee, the assignment was made, the company and assignee (a trustee) notified thereof, and the latter returned to the assignor his written acceptance thereof. The assignor retained the assignment until his death, never in any way indicating a purpose to revoke it, and it was held, after his death, that it was a valid as-

signment, enforceable in equity, but Chief Justice Breese, in rendering the opinion, said: "We place the most stress upon the first point discussed, and that is the intention of the donor. . . . At no time did he manifest any desire to retract, and though he occupied *locus poenitentiae*, he did not repent of his act, but left the world with the conception that those so dear to him had been provided for." If, in that case, the assignor was, during his lifetime, in *loco poenitentiae*, how can it be said here that Edward ²⁹⁷ L. Weaver was powerless, from the moment he sent the message to his mother, to repent of his act and do as it is conceded he did, with all the formalities and requirements of law and the conditions in his policy, by giving it, as the last act of his life, to his wife?

What we have here said sufficiently disposes of the point that a trust relation existed between the assured and his mother as to the assignment. We have shown that there was no valid delivery, and therefore the gift was imperfect. It was held in *Badgley v. Votrain*, 68 Ill. 25, 30, 18 Am. Rep. 541: "If the trust is perfectly created, so that the donor or settler has nothing more to do and the person seeking to enforce it has need of no further conveyance, . . . it will be carried into effect, although it was without consideration and the possession of the property was not changed; but if, on the other hand, the transaction is incomplete and its final completion is asked in equity, the court will not interpose to perfect the settler's liability without first inquiring into the origin of the claim and the nature of the consideration": Citing authorities. There was much stronger reason for holding that an enforceable trust existed between Williams and his sisters in the case of *Williams v. Chamberlain*, 165 Ill. 210, but we held that "from a mere imperfect gift a trust cannot be deduced": See *McCartney v. Ridgway*, 160 Ill. 129, and cases there cited. As was said in that case on page 153: "A court of equity will not aid a mere volunteer to carry into effect an imperfect gift or an executory trust."

Our conclusion is, that the decree of the circuit court was right, and, it will accordingly be affirmed and the judgment of the appellate court reversed.

GIFTS—DELIVERY OF INSTRUMENT.—Delivery of a deed is always essential to its operation and validity: *Weber v. Christen*, 121 Ill. 91, 2 Am. St. Rep. 68, and note. A gift *inter vivos* must be complete. The owner must divest himself of all dominion over the thing given, and the title to it must pass absolutely and irrevocably to the donee: *Bath Sav. Inst. v. Hathorn*, 88 Me. 122, 51 Am. St. Rep. 382.

GIFTS—DELIVERY TO THIRD PERSON.—Delivery of a gift may be made to some third person for the benefit of the donee, but the disposition in his favor must be such as will place the just disposition beyond the power of the donor to recall: *Love v. Francis*, 63 Mich. 181, 6 Am. St. Rep. 290.

A GIFT OR VOLUNTARY TRUST WILL NOT BE ENFORCED by a court unless completed: *Welsh v. Henshaw*, 170 Mass. 409, 64 Am. St. Rep. 309.

METROPOLITAN NATIONAL BANK v. MERCHANTS' NATIONAL BANK.

[182 ILLINOIS, 367.]

BANKS—RECOVERING MONEY PAID ON DRAFT FRAUDULENTLY ALTERED.—Money which has been paid by a bank upon a draft or check fraudulently raised or altered may be recovered from the party to whom it was paid, on the ground that the payment was without consideration and made by mistake.

BANKS—CERTIFIED CHECK—MONEY PAID ON FRAUDULENTLY ALTERED.—Certification by a bank of a check which has been fraudulently altered does not preclude it from showing the fact of such alteration, nor prevent a recovery from the party who received the check on the faith of the certification alone.

BANKS—CERTIFICATION OF CHECK—EVIDENCE OF LOCAL USAGE.—Evidence is inadmissible to prove that a contract of certification had, by local usage or the understanding of bankers and merchants, a larger scope and meaning than it had by settled legal construction.

BANKS—RECEIVING CHECK FOR DEPOSIT.—When a bank receives from a customer a check on another bank indorsed "for deposit," the bank is more than a mere agent to collect, and has authority to use the check in such manner as may make it most available to its protection, and it may have the check certified by the bank on which it is drawn.

BANKS—LIABILITY FOR RECEIVING MONEY ON FRAUDULENTLY ALTERED CHECK.—When one has received money as agent of another who had no right thereto and has not paid it over, an action may be sustained against the agent to recover the money. Hence a bank which receives for deposit a check fraudulently altered, and which receives payment from the drawee bank, the amount being credited to the indorser without paying it over, is liable to the drawee bank for the overpayment after demand is made therefor.

BANKS—OVERPAYMENT OF DRAFT—RECOVERY—TENDER.—After a formal demand for repayment has been made by a drawee bank which has paid a fraudulently altered draft, and the payee has refused to pay, no tender of the draft is necessary before bringing suit to recover the amount of the overpayment.

BANKS—OVERPAYMENT OF DRAFT—RECOVERY.—Where one bank pays to another the amount of a fraudulently altered draft, the former may recover the overpayment from the latter, notwithstanding the latter may have given credit on its books to the drawer of the full amount of the draft.

APPEAL—FAILURE TO POINT OUT ERROR IN BRIEF.—Error in giving or refusing instructions will not be considered on appeal when appellant's counsel fail to point out in their brief in what respect there was error.

Assumpsit to recover the difference between the amount of a draft as originally drawn and the amount paid after it had been fraudulently altered. The face of the draft had been raised from \$35 to \$3,500.

Moran, Kraus & Mayer, for the appellant.

Otis & Graves, for the appellee.

373 PHILLIPS, J. Where a check or draft drawn upon a bank has been fraudulently raised or altered after it was drawn, the rule is well settled that money which has been paid by a bank upon such a fraudulently raised or altered check may be recovered back from the party to whom it was paid, in an action for money had and received, on the ground that the payment was without consideration and made by mistake. The fact that the bank on which it was drawn has certified the check after the change has been made is not conclusive against such bank, nor does it preclude it from showing the fact of such alteration, nor prevent a recovery from the party who received the check on the faith and credit of the certification alone. In 2 Daniel on Negotiable Instruments, section 1661, it is said: "Where money is paid by the bank upon a raised or altered check by mistake, the general rule is, that it may be recovered back from the party to whom it was paid, as having been paid without consideration; but if either party has been guilty of negligence or carelessness by which the other has been injured, the negligent party must bear the loss. This doctrine is clear and is sustained by authority. The bank is not bound to know anything more than the drawer's signature, and, in the absence of any circumstances which inflicts injury upon another party, there is no reason why the bank should not be reimbursed. Its certification of the check does not preclude it from showing **373** an alteration, nor does its teller's declaration, after he has examined it, that it is right in every particular."

In 2 Morse on Banking, third edition, section 482, it is said: "The better doctrine seems to be that certification of a check by a bank is a voucher on the part of the bank only for the facts that the signature is genuine and that there are funds

enough to pay the amount for which the check purports to be drawn; that the bank does not warrant the genuineness of the body of the check or of any indorsement upon it; and that if there has been any fraudulent alteration or forged indorsement prior to such certification, the certification, like the payment, is made under a mistake of facts, and, as the payment could be recovered back, so the certification is not binding." Many authorities are cited as sustaining this proposition.

In *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67, 17 Am. Rep. 305, it was held: "When a check is presented for certification to a bank on which it is drawn, the purpose is to ascertain with certainty what the bank alone can know, and that is, whether the drawers of the check have funds sufficient to meet it, and, further, to obtain the engagement of the bank that those funds shall not be withdrawn from the bank by the drawers of the check. To this extent the knowledge of the bank enables it safely to go in the way of assertion, and its own power over its own funds will be sufficient to protect it as to its obligation."

In *Security Bank v. National Bank*, 67 N. Y. 458, 23 Am. Rep. 129, where an action was brought by a bank to recover the amount paid upon a raised check which had been certified by it, evidence that by the common understanding of banks and merchants the word "certified," at the time of certification, when used in the certification of checks, is construed to import an obligation on the part of the certifying bank to pay the amount stated in the check notwithstanding the body of it was forged, was held to be inadmissible. In such an action, the plaintiff was not estopped from alleging the forgery ³⁷⁴ by the fact that its teller, at the time that the check was presented for certification, upon doubts being expressed in regard to it by the person presenting it, stated that it was right in every particular; that it was no part of the teller's duty to give assurance as to the genuineness of the check except in respect to the signature of the drawer, beyond which the bank was not responsible for his representations.

In *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 43 Am. St. Rep. 247, it was held: "The evidence shows that appellee accepted two of the checks, 'payable through Chicago clearing-house,' prior to the time that they were transferred to Chapin & Gore. This makes no difference. An acceptor is bound to look only at the face of the bill or check, and an acceptance never proves an indorsement; and even if the sup-

posed indorsements of the payees of said two checks were on them at the times when they were respectively accepted, yet such acceptances did not admit the handwriting of the indorsers: *Smith v. Chester*, 1 Term Rep. 654; *Robinson v. Yar-row*, 7 Taunt. 455; 2 Eng. Com. L. 445. In this case, the acceptance or certification of the two checks simply warranted the genuineness of the signatures of the drawer, and that it had funds sufficient to meet them, and engaged that those funds should not be withdrawn from the bank by the drawer, and that the bank would pay, through the agency of the Chicago clearing-house, the amount, if any, actually due on the check to the person legally entitled to receive it. The acceptance or certification did not warrant the genuineness of the bodies of the checks, either as to the payees or the amounts, or warrant the genuineness of the indorsements on the checks."

At the time the draft in question was presented to the Merchants' National Bank through the Chicago clearing-house it had not only the indorsements of the drawer, but also stamped thereon, "American Trust and Savings Bank. Paid Feb. 14, 1894. Paid through Chicago clearing-house ³⁷⁵ to Metropolitan National Bank." With these indorsements thereon the draft in question was brought to the Metropolitan National Bank, and the legal effect of the indorsements was that the draft became the property of the latter bank and it owed the amount to the American Trust and Savings Bank. The indorsements were in no way restrictive, and contained no notice that appellant was acting as agent. As held in the case of *Security Bank v. National Bank*, 67 N. Y. 458, 23 Am. Rep. 129: "The offer to prove that the contract of certification, by local usage or by the understanding of bankers and merchants, had a larger scope and meaning than it had by settled legal construction, was inadmissible: *Bargett v. Oriental Mutual Ins. Co.*, 3 Bosw. 385; *Higgins v. Moore*, 34 N. Y. 417; *Lawrence v. Maxwell*, 53 N. Y. 19; *Wheeler v. Newbould*, 16 N. Y. 392."

Whilst a restricted character of indorsement cannot be shown to be different from that under which the indorsement would be held to be by its legal construction, the language of the stamped indorsement indicates that the draft was not deposited for collection merely, but for the purpose of being deposited to the credit of the American Trust and Savings Bank. The manner of doing business and the large sums kept on deposit with the Metropolitan National Bank by the American Trust and Savings Bank are indicative of such being the purpose and

intention—that it was indorsed for the purpose of collection and deposit, and not for the purpose of collection merely. It was held in the case of *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50: “When a bank receives from a customer a check on another bank for the special purpose of collection, the title does not pass by the special indorsement for that purpose, nor does the receiving bank hold the amount until the check is collected. But where the customer has a deposit account with the bankers on which he is accustomed to deposit checks payable to himself, which are entered on his pass-book, and to ³⁷⁰ draw against such deposits, an indorsement of the words ‘for deposit’ on a check so deposited is, in the absence of a different understanding, presumptive of more than mere agency or authority to collect. It is a request and direction to deposit the sum to the credit of the customer, and gives to the bankers authority not only to collect but to use the check in such manner as, in their judgment and discretion, having reference to the conditions and necessities of their business, may make it most available to their protection, and they may have it certified by the bank on which it is drawn.” The indorsement in that case was as follows: “For deposit.—A. Proskauer & Co., Agents.” The court, in defining the legal meaning of the indorsement, say: “The special purpose for which an indorsement for deposit is made, under such circumstances, may be readily inferred. It was a request and direction to the garnishees to deposit the same to the credit of the defendants, and conferred on them not only authority to collect, but also authority to put the check in such form and use it in such manner as, in their judgment and discretion, having reference to the conditions and necessities of their business, would make it most available to their protection. The effect of the indorsement for the consummation of this purpose is to vest the garnishees with the title and control of the check. If, in such case, the check is not paid, a banker depends for safety and indemnity on the drawer and the security of the indorsement.”

In *Brahm v. Adkins*, 77 Ill. 263, it was held: “The paper introduced in evidence showed merely the fact that defendants were bankers, a deposit with them by plaintiff, and the amount thereof. It was *prima facie* a general deposit. A deposit is general unless the depositor makes it special or deposits it expressly in some particular capacity: *Keene v. Collier*, 1 Met. (Ky.) 415; *Matter of Franklin Bank*, 1 Paige, 249, 19 Am.

Dec. 413. This, then, upon plaintiff's own showing, was the ordinary case of a deposit of money ³⁷⁷ with bankers, and there was an implied undertaking on their part to restore, not the same funds, but an equivalent sum, whenever it should be demanded: Story on Bailments, sec. 88; *Marine Bank v. Rushmore*, 28 Ill. 463; *Boyden v. Bank of Cape Fear*, 65 N. C. 13."

The evidence in this case showed that the American Trust and Savings Bank had a deposit account with the Metropolitan National Bank that was a running account, and the amount of deposits between the fourteenth and twentieth days of February is given. The evidence shows that there was deposited in the Metropolitan National Bank to the credit of the American Trust and Savings Bank the following: On the night of the 14th of February, \$338,831.43; on the night of the 15th of February, \$333,668.76; on the night of the 16th of February, \$245,440.25; on the night of the 17th of February, \$198,108.88; on the night of the 19th of February, \$288,018.77; on the night of the 20th of February, \$389,484.18; and there is no evidence to show that the money collected on this draft was paid over to the American Trust and Savings Bank, further than that it was carried into the account between the two banks.

The principle with reference to an agent is, as long as he stands in his original situation, where he has received money by mistake and has done no act on the assumption that the payment was good, and there has been no change of circumstances by reason of his having paid over the money to his principal or nothing done equivalent to it, he remains liable individually. The mere forwarding of the account to his principal and placing the money to his credit are not such circumstances as will relieve him: *Mechem on Agency*, sec. 562. It was held in *Smith v. Binder*, 75 Ill. 492: "When a contract has been rescinded, or a person has received money as agent of another who had no right thereto and has not paid it over, an action may be sustained against the agent to recover the money; and the mere passing of such money ³⁷⁸ in account with his principal, or making a rest without any new credit given to him, fresh bills accepted, or further sums advanced to the principal in consequence of it, is not equivalent to a payment of the money to the principal."

The indorsement by Harper, with the American Trust and Savings Bank, was expressly an indorsement for a deposit to the credit of the indorser when the same should be collected. It reads: "For deposit in the American Trust and Savings Bank.—

Credit of Frank H. Harper." Neither that indorsement nor the stencil stamp of the American Trust and Savings Bank can be construed to be other than an unconditional deposit. Whatever the relation was between the Metropolitan National Bank and the American Trust and Savings Bank, there is no evidence that the relations between the two banks were disclosed to the Merchants' National Bank or that it had knowledge of any fact of the agency. It is said in 2 Morse on Banking, section 577: "But where the customer has a deposit account with the bankers, on which he is accustomed to deposit checks payable to himself, which are entered on his pass-book, and to draw against such deposit, an indorsement of the words 'for deposit' on the checks so deposited is, in the absence of a different understanding, presumption of more than mere agency or authority to collect. It is a request and direction to deposit the sum to the credit of the customer, and gives to the bankers authority not only to collect but to use the check in such manner as, in their judgment and discretion, having reference to the condition and necessities of their business, may make it more available in their possession, and they may have it certified by the bank on which it is drawn." Neither the indorsement and transfer of the draft by Harper to the American Trust and Savings Bank nor by that bank to the appellant constituted a restricted indorsement, disclosing the relation of agency on the part of the appellant, and for collection only.

³⁷⁹ As to the question with reference to the giving and refusing of instructions, we adopt the reasoning and concur in the conclusions reached by the appellate court, as follows:

"The first instruction given for appellee is claimed to be erroneous in that it fails to contain two facts essential to recovery by appellee, namely: 1. The necessity of offering to return the draft and of providing that appellee had a claim at the time of the commencement of this suit; and 2. That in the collection of the draft appellant acted as agent of the American Trust and Savings Bank, and paid over the money before receiving any notice that the draft had been altered or any demand for the repayment of the money. The instruction is, namely:

"1. The jury are instructed that if they find, from the evidence, that the Flour City National Bank of Minneapolis, on or about the seventh day of February, 1894, issued its draft upon the plaintiff for the sum of \$35, payable to the order of Frank H. Harper, and delivered it to him for that sum, but

afterward the said draft was fraudulently altered and raised by said Frank H. Harper, or some person unknown, so that it purported to be drawn for the sum of \$3,500 instead of for the sum of \$35 only, without the knowledge or consent of the said Flour City National Bank, the drawer thereof, and that afterward the said draft, so fraudulently raised and altered as aforesaid, was presented to the plaintiff for certification and acceptance, and that thereupon the said plaintiff, by its duly authorized agent in that behalf, without knowledge that said draft had been changed or altered, indorsed upon said draft the following words: "Accepted, payable through Chicago clearing-house, February 13, 1894, when properly indorsed.—Merchants' National Bank, by Philip P. Lee, teller," and that the said draft was by the said Frank H. Harper deposited for credit in the American Trust and Savings Bank of Chicago, and that the same was by said American Trust and Savings Bank indorsed ³⁸⁰ and delivered to the defendant, and that afterward said plaintiff paid to the defendant, in the usual course of business, the full sum of said \$3,500, being the amount of said draft after the same had been so fraudulently changed and raised as aforesaid, instead of the sum of \$35, being the sum for which said draft was actually drawn, without knowledge of the fact that it had been so raised and changed, and that subsequently, and within a reasonable time after the discovery of the fact by the plaintiff that said draft had been fraudulently changed and altered, as aforesaid, from \$35 to \$3,500 (if the jury find, from the evidence, that it had been so fraudulently changed and altered), demand was made by the plaintiff on said defendant for repayment of said amount so received and collected on said draft in excess of \$35, the sum for which it was originally drawn, and that payment thereof by said defendant was refused, then the jury are instructed that the plaintiff had a right to recover of the defendant in this action the sum of \$3,465. The jury are further instructed that in case they find, from the evidence, the plaintiff is so entitled to recover from said defendant the sum of \$3,465, and if they further find, from the evidence, that there has been unreasonable and vexatious delay in the payment of the same by the said defendant to the said plaintiff, they may allow interest thereon at the rate of five per cent per annum.'

"When appellant was requested to redeem the draft by appellee, the draft was turned over to appellant and by it retained until it had made investigation, whereupon, having refused to

redeem the draft, appellant returned it to appellee, and cannot be heard now, in the face of these facts, to claim that appellee should again offer to return the draft; and, moreover, no tender of the draft was necessary after a formal demand was made for its payment and a refusal to pay by appellant: *Brewster v. Burnett*, 125 Mass. 68, 28 Am. Rep. 203.

381 "Whether appellee charged or credited the Flour City National Bank with the amount of the draft was immaterial. The facts, as shown by the record outside the bookkeeping of appellee, fix the rights of appellee and the Flour City Bank. When appellee accepted the draft under the circumstances shown, it became liable to pay it, and when the draft was paid and the forgery afterward discovered, appellee could rightfully charge the Flour City Bank only the amount for which the draft was originally drawn, and it could make no difference, as between the Flour City National Bank and appellee, whether appellee credited on its books the proper amount before or after this suit was commenced: *Brewster v. Burnett*, 125 Mass. 68, 28 Am. Rep. 203.

"What has been said in regard to the agency of the appellant, and notice to appellee of such agency, disposes of the remaining contention as to this instruction. Under the evidence, so far as concerns the alleged agency, the court might well have instructed a verdict for appellee instead of submitting the matter to the jury. We see no error in the instruction. The same contention is made by appellant as to instructions 2 and 3 given for appellee. It is unnecessary to set them out. We think there was no error in giving them.

"The court also refused twenty-four other instructions asked by appellant, and gave for appellee instructions Nos. 4, 6, and 7, of which complaint is made, but in what respect there was error in refusing or giving any of these numerous instructions counsel have not attempted, by their brief, to point out, and we do not feel called upon to consider them further than to say we have examined the instructions given for appellee and appellant, and being of the opinion that the jury was fully instructed on the questions at issue and that the record presents no reversible error, the judgment will be affirmed."

The judgment of the appellate court will be affirmed.

BANKS—FORGED CHECKS.—A banker upon whom a forged check has been drawn, cannot recover the amount from a bona fide holder to whom he has paid it: *Germania Bank v. Boutell*, 60 Minn. 189, 51 Am. St. Rep. 519, and note.—But see *First Nat. Bank v.*

First Nat. Bank, 4 Ind. App. 355, 51 Am. St. Rep. 221; First Nat. Bank v. First Nat. Bank, 58 Ohio St. 207, 65 Am. St. Rep. 748, and note; German Sav. Bank v. Citizens Nat. Bank, 101 Iowa, 530, 63 Am. St. Rep. 399; monographic note to Laborde v. Consolidated Assn., 39 Am. Dec. 519-526.

BANKS—CERTIFYING ALTERED CHECKS.—A check was fraudulently altered as to the date and name of the payee, and the amount was raised. The plaintiff bank on which it was drawn certified it, and afterward paid it to the defendant bank. In an action to recover as for money paid by mistake, it was held that the plaintiff was entitled to recover; Marine Bank v. National City Bank, 59 N. Y. 67, 17 Am. Rep. 305. See, also, First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296, 43 Am. St. Rep. 247; Security Bank v. National Bank, 67 N. Y. 458, 23 Am. Rep. 129.

BANKS—CERTIFICATION OF CHECKS—LOCAL USAGE.—By certifying a check a bank undertakes that the plaintiff has sufficient funds in the bank to meet it and that these funds shall not be withdrawn, and extrinsic evidence is not admissible to prove the understanding of merchants and bankers as to the effect of a certification; Security Bank v. National Bank, 67 N. Y. 458, 23 Am. Rep. 129.

BANKS—CHECKS FOR DEPOSIT.—A bank receiving from a customer a check on another bank indorsed "for deposit," and procuring it to be certified by the drawee, becomes at once liable to the depositor as for money had and received; National Commercial Bank v. Miller, 77 Ala. 168, 54 Am. Rep. 50. See, also, Wasson v. Lamb, 120 Ind. 514, 16 Am. St. Rep. 342, and note.

BONDS, COUNTERFEIT—RECOVERY OF PURCHASE MONEY—RETURN OF BONDS.—A purchaser and holder of United States bonds, redeemed by the United States after his purchase, may recover the purchase money without returning the bonds; Brewster v. Burnett, 125 Mass. 68, 28 Am. Rep. 203.

HARDING v. AMERICAN GLUCOSE COMPANY.

[182 ILLINOIS, 551.]

APPEAL—WHAT MAY BE CONSIDERED ON—WITHDRAWAL OF ANSWER.—Where testimony is taken on behalf of a complainant upon an issue of fact raised by a bill, answer, and replication, the supreme court may consider such testimony in passing upon the issues involved, though the answer has been withdrawn and a decree pro confesso has been entered against the defendants.

APPELLATE PRACTICE—DISMISSING BILL FOR WANT OF EQUITY.—Where a bill is sufficient on its face to sustain the contention of the complainant, and to entitle him to the relief prayed for, a decree dismissing the bill for want of equity should not be entered in favor of a defendant, who, by his default, has confessed the bill.

BANKS AND BANKING—POWERS.—A banking corporation has no power to purchase the plants and properties of manufacturing corporations, and option contracts, providing for the sale of such properties to a bank, are void.

CORPORATIONS—POWERS—MEETING OUTSIDE THE STATE.—A corporation has no power to perform distinctly cor-

porate acts, such as holding a stockholders' meeting, outside of the state of its creation.

CORPORATIONS—COMBINING TO FORM MONOPOLY—PUBLIC POLICY.—Any combination of competing corporations, the necessary consequence of which is the controlling of prices, or limiting of production, or suppressing of competition, in such a way as to create a monopoly, is contrary to public policy and void.

THE PUBLIC POLICY OF A STATE is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts, and in the constant practice of government officials.

PUBLIC POLICY—TRUSTS AND MONOPOLIES.—The public policy of Illinois has always been against trusts and combinations organized for the purpose of suppressing competition and creating monopoly.

CONTRACTS—MONOPOLY—COMMON LAW.—An agreement, tending to prevent competition and create a monopoly, is void by the principles of the common law, because it is against public policy.

CONTRACTS—ILLEGAL COMBINATION—NECESSITY FOR WRITING.—An agreement for an illegal combination may be a verbal agreement or understanding, or a scheme not embodied in writing, but evidenced by the action of the parties.

CORPORATIONS—MONOPOLY—REDUCTION OF PRICES. A corporation, organized for the purpose of controlling the manufacture and sale of a commodity is unlawful and against public policy, since its object and direct tendency are to prevent fair competition and to control prices, although the price of such commodity is in fact reduced.

CORPORATIONS—SUIT BY STOCKHOLDER.—Where the officers of a corporation wrongfully deal with its property to the injury of the stockholders, they may maintain a bill against the corporation and its officers for relief against such misappropriation.

CORPORATIONS—INJUNCTION BY STOCKHOLDER—MONOPOLY CONTRACT.—Where a corporation enters into a contract which is illegal because it provides for a monopoly, a stockholder may enjoin the performance of such contract, since if carried out it may lead to a forfeiture of the charter of the corporation and its dissolution, which would result in wiping out the stock of the stockholder.

CORPORATIONS—SALE OF PROPERTY AND FRANCHISES—INJUNCTION BY STOCKHOLDER.—A stockholder in a corporation may enjoin it from an attempt to abandon its business and sell its assets without a legal termination or dissolution of the corporation, even though such stockholder is to receive his proportionate share of the proceeds of the sale of the property, since he has a right to hold his investment in the form of stock, and a change of such investment against his consent is a change which affects his pecuniary or financial interests.

CORPORATIONS—FOREIGN—POWERS.—Foreign corporations do not come into a state as a matter of legal right, but only by comity, and such corporations are subject to the same restrictions and duties as domestic corporations, and have no other or greater powers.

CONTRACTS RELATING TO LAND.—The validity of all transactions relating to land depends upon the laws of the state where the land is situated.

CONTRACTS IN TOTAL RESTRAINT OF TRADE are void; but contracts in restraint of trade are valid, and will be enforced, where the restraint is reasonable, partial, and founded upon a good consideration.

PLEADING—DEMURRING AND ANSWERING.—The defendant may not answer and demur also to the same part of a bill. If he demur to a part and answer to the same part, the demurrer in such case is overruled by the answer.

VENDOR AND PURCHASER—SALE PENDING LITIGATION.—A purchaser from the defendant while a suit is pending acquires his interest subject to such decree as may be rendered on the hearing.

WITNESSES—REFUSAL TO ANSWER IMMATERIAL QUESTION—EFFECT OF.—A witness may not refuse to answer merely because a question calls for immaterial testimony, where no self-incrimination or privileged communication is involved; and the fact of such refusal is to be considered against him, the same as any other refusal to produce evidence which is within the power of a witness.

William J. Ammen, for the plaintiffs in error.

Moran, Kraus & Mayer, for the defendants in error Joseph Firmenich and George Firmenich.

Wilson, Moore & McIlvaine, for the defendant in error the Glucose Sugar Refining Company.

588 **MAGRUDER, J.** The bill in this case is filed by a stockholder in the American Glucose Company, a corporation organized under the laws of New Jersey, but doing business and owning property at Peoria, in Illinois. The stockholder who files the bill is a citizen of Illinois. The American Glucose Company owned a plant, consisting of real estate, together with the buildings and machinery located thereon, and also personal property, in the city of Peoria in Illinois. The land, upon which the plant is situated, is specifically described in the bill. The primary object of the bill, and the chief relief sought by it, are to prevent the officers and directors of the American Glucose Company from selling and disposing of its plant in Peoria, and from closing out the business, in which it is there engaged, of manufacturing glucose and grape sugar.

The bill charges that the officers and directors of the corporation have been squandering its assets by diverting the profits made in its business to their own use; and that, in further consummation of their fraudulent disposition of the property of the company, they are about to make a sale of the manufacturing plant in Peoria to a new corporation organized under the laws of New Jersey, and to give up and abandon the business of the company as theretofore conducted in Peoria.

The bill further charges that not only is the American Glucose Company about to make a sale of its plant ⁵⁸⁰ to the new corporation, but that five other corporations, engaged in the same business of manufacturing glucose and grape sugar, are about to make sales of their respective plants to the same newly organized corporation; that all of said sales constitute one transaction, and that the sale of the American Glucose Company is merely a part of that transaction.

It is charged in the bill that the arrangement by which the proposed new corporation is to take conveyances of all these plants constitutes a giant pool, trust, or combine, formed for the purpose of regulating, fixing, and controlling the prices of glucose and grape sugar, and of suppressing competition in the manufacture thereof, and of creating a monopoly therein.

1. Shortly after the filing of the bill on August 3, 1897, the American Glucose Company and William Hamlin, president thereof, and Cicero J. Hamlin and Harry Hamlin, directors and officers thereof, and all other directors and officers and stockholders thereof (except appellants), filed their answers to the bill. These answers were subsequently withdrawn, but not until June 22, 1898, while the cause was on hearing before the circuit court. Replications were filed to these answers, and an issue of fact was thus made up upon the allegations of the bill, which set up the formation of an illegal trust or combine. Upon the issue of fact as to the purchases of the plants of other corporations than the American Glucose Company with a view of forming an illegal trust and crushing out competition and creating a monopoly in the manufacture of glucose and grape sugar, testimony was taken on behalf of the complainants in the bill. We are unable to see why the consideration of the facts as developed by this testimony is not necessarily involved in the decision of this case by this court, notwithstanding the insistence by one of the counsel for defendants in error in his brief, that "no discussion of any evidence, or pretended evidence, in relation thereto is proper in this court."

⁵⁹⁰ It is true that, upon the hearing of the cause, the American Glucose Company and its officers and directors and majority stockholders withdrew their answers, and permitted a default and decree pro confesso to be entered against them. This action on their part was a confession of the truth of all the allegations of the bill, which they had answered and put at issue. But the proof, taken in support of those allegations, was not thereby necessarily withdrawn from the consideration.

of the court in passing upon the issues involved in the case. Section 18 of the chancery act provides that, "where a bill is taken for confessed, the court, before a final decree is made, if deemed requisite, may require the complainant to produce documents and witnesses to prove the allegations of his bill, or may examine him on oath or affirmation, touching the facts therein alleged. Such decree shall be made in either case as the court shall consider equitable and proper": 1 Starr and Curtis' Annotated Statutes, c. 22, p. 401. Here, the court did not require the complainants below to introduce proof to sustain the allegations of their bill, but the complainants had the right, even before issue joined, to take depositions to substantiate the averments of their bill: *Doyle v. Wiley*, 15 Ill. 576. Certainly, they had a right to do so, after issue was joined. It being a matter of discretion with the court, even after default, to require proofs of the averments of the bill, it may be that, if the complainants, on being required by the court to do so, should fail to comply, their bill might be properly dismissed for want of such proofs. But the general rule is that, where a bill is sufficient on its face to sustain the contention of the complainants therein, and to entitle them to the relief prayed for, a decree dismissing the bill for want of equity should not be entered in favor of defendants, who, by their defaults, have confessed the bill: *Hoffman v. Schoyer*, 143 Ill. 598. In the present case, the court below dismissed the bill as to the defaulted defendants, as well as to the other defendants. This action ⁵⁹¹ of the court was, in our opinion, erroneous, not only because the bill was sufficient to justify the relief prayed for, but because its material allegations were sustained by the proofs. This proof was clearly applicable to the actions taken in the premises by the American Glucose Company and its officers and directors and majority stockholders, who answered the bill. Whether such proof is binding upon the Glucose Sugar Refining Company, holding from and under the American Glucose Company, will be considered hereafter.

As, therefore, the proof is before us in the record, and the case is one of great importance, we deem it our duty, before discussing the questions of law arising out of the demurrer or demurrers to the whole bill or to parts thereof, to examine the testimony upon the issue of fact made by the answers filed.

In the spring of 1897, six corporations were engaged in the manufacture of glucose, two of them in the state of Iowa, and four of them in the state of Illinois. They were the Chicago

Sugar Refining Company, operating in the city of Chicago; the American Glucose Company, operating in the city of Peoria; the Peoria Grape Sugar Company, also operating in the city of Peoria; the Rockford Sugar Refining Company, operating in Rockford, Illinois; the American Preservers' Company, otherwise spoken of as the Davenport Sugar Refining Company, operating at Davenport, Iowa; and the Firmenich Manufacturing Company, operating at Marshalltown, Iowa. There was another manufactory of glucose at St. Charles, Illinois, known as the St. Charles Glucose Company, operated by one Charles Pope, of St. Charles and Chicago. Pope refused to enter the combination hereinafter mentioned at the outset, and is spoken of by some of the witnesses as an "awkward" competitor. The Pope manufactory, however, was of small capacity compared with the others. All of these corporations, thus engaged in the manufacture of glucose and grape sugar, were competitors⁵⁹² with each other in that business. The proof shows that glucose cannot be successfully manufactured except in what is known as the corn belt of the United States, including the states of Illinois, Iowa, Kansas, Missouri, and parts of Nebraska, South Dakota, Kentucky, and Indiana. The corn belt constitutes an ellipse of about 950 miles in length from east to west and about 700 miles in width, with Peoria as the geographical center, and all within a thousand miles of Chicago. The products of glucose are extensively used; and it is an important constituent in the matter of making table syrups, jellies, and jams, and is also used in the manufacture of beers and wines and cordials. The manufactories, as above named, consumed a little more than 100,000 bushels of corn daily in the manufacture of their products. The American Glucose Company consumed daily about 26,000 bushels of corn; the Chicago Sugar Refining Company consumed in said manufacture about 26,000 bushels of corn daily; the Peoria Grape Sugar Company, which was, however, slightly crippled by a fire consuming part of its plant, consumed therein about 15,000 bushels of corn daily; the Rockford Sugar Refining Company consumed about 16,000 bushels of corn daily; the Davenport Sugar Refining Company, or the American Preservers' Company, consumed about 9,000 bushels of corn daily; and the Firmenich Manufacturing Company consumed about 9,000 bushels of corn daily. The capacity of the Pope Manufacturing Company was about 6,000 or 7,000 bushels of corn daily.

Some time in May, 1897, as nearly as we can gather from the

record, a scheme was formed for the purpose of uniting all these corporations in one ownership. The plants, including both real and personal property, so far as they were engaged in the manufacture of glucose and grape sugar, were to be transferred by these corporations respectively to a new corporation to be organized under the laws of New Jersey. Such corporation was not organized ⁵⁹³ completely until August 2, 1897. Its charter, or certificate of organization, bears date August 2, 1897, though it would appear that it did not go into practical operation until August 3, 1897, or shortly thereafter. The parties who were engaged in forming, promoting, carrying out, and consummating the scheme for the consolidation of the property interests of all of said corporations, were principally the officers, directors, attorneys, and majority stockholders in the old corporations respectively. Nearly all of them, if not all of them, were citizens of Illinois. The principal persons engaged in forming and consummating this consolidation, were Norman B. Ream and John W. Doane, who were largely interested in the Rockford company above mentioned; William Hamlin, the president of the American Glucose Company; Conrad H. Matthieson of the Chicago Sugar Refining Company; two Chicago lawyers, named John P. Wilson and Levy Mayer, Wilson being also a stockholder in the Chicago Sugar Refining Company; William H. Henkel, secretary of the Illinois Trust and Savings Bank of Chicago; and one J. B. Greenhut. Norman B. Ream was a director in the Illinois Trust and Savings Bank of Chicago. Between the early part of May, 1897, and August 11 or 12, 1897, all the plants above mentioned, except that of Pope, belonging to the six corporations hereinbefore described, were transferred to the Glucose Sugar Refining Company of New Jersey; and said plants since August 12, 1897, have been in the possession of and operated by the Glucose Sugar Refining Company of New Jersey. After August 7, 1897, they ceased to be operated by the respective corporations theretofore owning them. As we understand the evidence, these six corporations were, with the exception of the Pope manufactory at St. Charles, Illinois, the only manufactories engaged in the manufacture and sale of glucose and grape sugar within the limits of the corn belt already described. The negotiations and transactions, leading to the result thus accomplished, were ⁵⁹⁴ conducted secretly and with great caution. The organization of the new corporation, which was to be vested with the title to the plants, was deferred until the last moment, and was not

consummated until the day before, or the day on which, the present bill was filed.

The general method adopted for the consolidation of these properties was substantially as follows: Option contracts were drawn up, one for each of the corporations already mentioned. By the terms of these option contracts, which were made between each of said corporations on the one part, and the Illinois Trust and Savings Bank of Chicago on the other, the corporation agreed to sell all its real and personal property and plant and leaseholds, machinery, easements, buildings, fixtures, and utensils, located at the place at which it was engaged in the manufacture of glucose, together with its goodwill, trade rights, trademarks, and the right to use its patents, to the bank upon the request of the bank, or its transferee, provided such request should be made before August 15, 1897. The option contract between the Firmenich Manufacturing Company of Iowa and the Illinois Trust and Savings Bank of Chicago was dated May 24, 1897; the contract between the Rockford Sugar Refining Company, Limited, of Illinois and the bank was dated May 25, 1897; the contract between the Chicago Sugar Refining Company of Illinois and the bank, and that between the Peoria Grape Sugar Company, and the bank, were dated June 7, 1897; there are two contracts between the American Preservers' Company of West Virginia and the bank, one dated June 3, 1897, and the other dated July 19, 1897, the latter recited to be a substitute for the former; the second contract between the American Glucose Company of New Jersey and the bank was dated June 9, 1897. Some of these contracts state that a part of the purchase money for the plant and property to be sold is to be paid in the stock of a corporation with a capital stock of \$40,000,000 of which \$14,000,000 ⁵⁰⁵ is to be preferred stock, and \$26,000,000 common stock, which said corporation is about to be organized and to acquire said property, and also the properties specified in the contracts made between the five other corporations and the bank. Some of these contracts provide that the bank may pay for the property at its option in the stock of the new corporation to be formed, instead of cash. The contracts also contain a provision, by the terms of which the vendor corporation and its officers agree not to buy or sell or manufacture glucose, or its kindred products or by-products, for a certain term of years within a thousand miles of Chicago, the said term of years being three years in some instances, and twenty-five years in at least one instance. The defendant in

error, the Glucose Sugar Refining Company of New Jersey, a corporation which was to be organized according to the terms of these option contracts, and which was finally organized as above stated, is a corporation, whose certificate of organization provides that it shall have power to conduct business throughout the United States and all foreign countries with the object of manufacturing and selling glucose, and buying and selling corn and all its products and by-products and similar articles of merchandise, and to transport the same, and to do all lawful business incidental thereto; and said certificate further provides that the total amount of the stock shall be \$40,000,000 of \$100 per share, \$14,000,000 to be preferred stock, and \$26,000,000 common stock, etc.

The first option contract, made between the defendant in error, the American Glucose Company, and the Illinois Trust and Savings Bank, was dated May 19, 1897. Thereby, the American Glucose Company agreed to sell to the bank its plant, etc., for \$1,750,000, one-third in cash, and the balance to be paid by notes secured by mortgage on the property; it further provides, that "it is the purpose of the bank, or of those for whom it acts, to organize a corporation under the laws of one of the states of the ⁵⁹⁶ Union for the purpose of operating this plant." The contract of May 19th further provides that an exhibit of the new corporation and its means shall be made to the president of the American Glucose Company, and then proceeds as follows: "If he [said president] be satisfied with the nature and extent of the property so owned, or if it be the property, which has been verbally stated to him will be acquired by such corporation, then \$600,000 in amount at par of the preferred stock of such corporation, out of a total issue not exceeding \$14,000,000, and \$850,000 in amount at par in the common stock of such corporation, out of a total issue not exceeding \$26,000,000, shall be lodged with such president, and this stock shall be held as an additional collateral security for the payment of such notes and each thereof," etc. This agreement of May 19th also provides that the bank is to purchase all the supplies and material on hand belonging to the American Glucose Company, and is to assume all the bona fide contracts made by the company in due course of business. It also provides that the company and its officers and directors, including the Hamlins, shall bind themselves to the corporation not to buy or sell glucose within a thousand miles of Chicago. An unsigned copy of this contract is in the record. The con-

tract of May 19, 1897, was not signed by the bank, and it is claimed by William Hamlin, the president of the American Glucose Company, that it was not signed by that company. We think, however, that it was signed by the American Glucose Company, as it was originally drawn. A new option contract for the sale of its property to the bank, bearing date June 9, 1897, was executed by the American Glucose Company by William H. Hamlin, its president, as a substitute, as is alleged, for the contract of May 19, 1897; and it makes the following recital in the eleventh paragraph, to wit: "This agreement is in lieu of and in substitution for a certain other option, bearing date the nineteenth day of May last, which was executed by the glucose company, ⁵⁹⁷ running to the bank, and which was delivered to J. B. Greenhut," etc.

The option agreement of June 9, 1897, fixes the price of the realty of the American Glucose Company at \$1,750,000, and its section 6 provides that the American Glucose Company and the Hamlins are not to make or buy or sell glucose for five years within a thousand miles of Chicago.

The agreement of June 9, 1897, is claimed by plaintiffs in error to be a contract of sale to the bank of the property of the American Glucose Company for cash, and it is contended that all the provisions for the taking of stock in the new corporation to be organized, either as purchase money, or as collateral to notes given as purchase money were eliminated. The evidence certainly shows that many of the officers and stockholders in the corporations which sold their plants to the new corporation held stock in the latter after the transfer of the plants to it. William Hamlin and Harry Hamlin both held stock in the Glucose Sugar Refining Company at a date subsequent to the delivery of the deed, which conveyed to that company the plant of the American Glucose Company. It is a fair conclusion from the testimony that the purchases of many of the six plants were paid for, either in whole or in part, by the stock of the new company. An instance of testimony of this kind is furnished by the letter of June 21, 1897, written by Levy Mayer to William Hamlin, and Hamlin's reply thereto, dated June 22, 1897; that letter and reply are as follows:

"First, you will underwrite \$500,000, taking \$500,000 preferred stock and about one hundred and forty-three per cent additional common, and will make a contract with a responsible party by which, in effect, you are to have the right to 'put' the amount so underwritten within a year and the other parties to

have the right to 'call' that amount within the same time, the purchase price to be the amount to pay for the underwriting and six per cent additional. ⁵⁹⁸ This arrangement to be embodied in a contract, which shall be legally enforceable. Second, you will underwrite an additional \$500,000 upon a basis say of fifty per cent, you to get the \$500,000 preferred stock and about one hundred and forty-three per cent additional common stock, and to make a contract by which the second party is to have the right, within one year, to purchase of you this \$500,000 so underwritten, and to receive from you the \$500,000 preferred stock and one hundred and forty-three per cent common stock and to pay the price you paid therefor—that is to say, fifty per cent, or \$250,000, and six per cent interest thereon; you to have no right to 'put,' but the other party to have the right to 'call.' All this to be embodied in a contract legally enforceable." The letter then adds, viz.: "Should what I state here be in any way different from your understanding of the facts, I shall be glad if you will send me a line putting me right."

"Buffalo, N. Y., June 22, 1897.

"Mr. Levy Mayer, 811-839 Unity Building, Chicago, Ill.

"Dear Sir: Your favor of the 21st inst. is this morning received. Your understanding of my proposition to underwrite, as therein expressed, is correct in every particular. You will remember that you said on Saturday that a 'put and call' arrangement, such as I have suggested, would not be legal in Illinois, and that you did not know whether it would be in New York state or not. At this writing I have had no legal advice upon the subject. Yours very truly,

"WILLIAM HAMLIN."

The letters above quoted show that, after June 9th, when the last option contract of the American Glucose Company with the bank was executed by that company, Hamlin proposed to underwrite more than \$1,000,000 of stock in the new corporation to be formed; he says that the proposition to take this stock was made on behalf of the company, and would inure to the benefit of the stockholders. But whether the plant of the American Glucose Company was paid for in cash or in stock of the Glucose Sugar Refining Company makes no practical difference. The purchase of the plant of the American ⁵⁹⁹ Glucose Company was a part of the single transaction, which involved the purchase, at one and the same time, of the plants of all the six corporations. This was well known to William Hamlin,

president of the American Glucose Company. He knew, and was informed by letters from the promoters of the transaction, that they were trying to purchase or secure the property of the other five companies. He also knew that the purchase of the other properties and the organization of the new corporation would not be effected or accomplished unless there was at the same time a transfer of the property of the American Glucose Company. The parties organizing the combination refused to consummate it, unless Hamlin would bring into the combination the property of the American Glucose Company. Money and subscriptions were secured upon the faith of the option contract executed by Hamlin for the American Glucose Company, and deposited with the Illinois Trust and Savings Bank, on account of the belief by the parties paying such money and subscriptions that the American Glucose Company was to be a party to the combination.

That all the corporations acted together in the matter is shown clearly by the correspondence, including the letters of the attorneys, and by the facts that the option contracts of all the companies were delivered at the same time to the same repository, to wit, the bank, to be transferred by the bank as the promoters of the scheme should direct, and by the further fact that all the deeds, conveying the several properties to the new corporation, were executed about the same time, and delivered simultaneously.

On June 11, 1897, John P. Wilson, Levy Mayer, and J. B. Greenhut, over their own signatures, addressed and delivered to the Illinois Trust and Savings Bank of Chicago a written communication, by the terms of which they deposited with the bank the six option contracts, executed by the six corporations respectively, and by ⁶⁰⁰ the terms of which it was agreed to sell their respective properties to the bank; and, in said written communication, after describing the contracts, the following statements were made, to wit: "All of the said contracts are deposited with you on the following conditions: 1. You shall hold, transfer, assign, or otherwise dispose of all of the said contracts in such way, and in such way only, as you shall be directed to do by the joint order in writing of the undersigned; 2. Unless you shall receive the joint order to the contrary thereof before August 16, 1897, you are authorized, upon the request of said parties to said contract, to surrender and deliver to said respective first parties their respective contracts." Below the signatures of Wilson, Mayer, and Greenhut, the Illinois Trust

and Savings Bank, by William Henkel, its secretary, wrote the following, to wit: "The undersigned hereby acknowledges the receipt of all the contracts mentioned in the foregoing instrument, and hereby agrees to hold said contracts subject to the conditions and provisions specified in said foregoing instrument."

The option contracts thus deposited with the Illinois Trust and Savings Bank remained with that bank until about August 5, 1897, or a few days thereafter. Let us see what was done in the meantime. On July 15, 1897, Levy Mayer telegraphed to William Hamlin, president of the American Glucose Company, to send abstract of title, and in his telegram added the following words: "Deal closed. Keep strictly confidential." About the same time Mayer wrote to Hamlin, acknowledging the receipt of a letter and telegram from him in regard to notice of a stockholders' meeting thereafter to be held, in which letter Mayer says: "The Davenport company, I am satisfied, for legal reasons could not be legally shut down, owing to the fact that its plant is in possession of its lessee, the Davenport Syrup Refining Company, which latter has a number of substantial contracts yet to be filled. I succeeded, however, in making very satisfactory ⁶⁰¹ arrangement, by which it will be optional to the new company to take over outstanding contracts and to purchase undelivered produce on hand. May I trouble you to send me, as soon as possible, accurate memoranda of the improvements, and contracts for improvements, etc., which under your contract you will ask the new company to assume."

On July 17, 1897, Mayer sent to William Hamlin, president of the American Glucose Company, at Buffalo, New York, the following telegram: "Letter received. Matter has reached a point where its consummation is a certainty. It has been financed successfully and most satisfactorily, as you will agree when you learn details. If your counsel thinks stockholders' meeting necessary, please have same called to-day. A day or two is of the greatest service to me at this time. In your notice of meeting please state no more than is legally requisite. Am procuring the consent of different companies to shut down. Chicago, Peoria, Rockford, have agreed to do so at once. Firmenich has agreed to do so not later than next Saturday. Am now negotiating with Davenport in that direction. Would like you to do as we have done." To this telegram from Mayer, Hamlin sent the following telegram in reply: "We will do everything to facilitate you. Works stopped grinding Thursday on account of coal strike."

Can there be any doubt, after reading these letters and telegrams, that these parties were engaged in a scheme to have all the six corporations shut down their manufactories, and abandon their business? Can there be any doubt that Hamlin, president of the American Glucose Company, knew that the other corporations were shutting down their plants with a view to conveying them to a new corporation, and that, in transferring the plant of his own company, he was aiding the consolidation of all the properties in one giant trust? It must be remembered in this connection that preparations were all the ⁶⁰² time going on for the organization of the new corporation, and that this new corporation was organized on August 2 or 3, 1897, and took possession of and commenced operating all the plants of the six corporations, which had suspended business, on and after August 12, 1897. But this is not all. On July 19, 1897, the board of directors of the American Glucose Company made and passed a resolution, which is set out in full in the statement preceding this opinion, wherein it was resolved that it was advisable to relinquish the business of manufacturing glucose and grape sugar, and such other business as it was engaged in at Peoria; and wherein it was resolved that the nature of its business should be changed, and that its plant and property in Peoria should be sold, and that its manufacturing should be thereafter confined to the manufacture of starch in Buffalo; and that a meeting of stockholders should be called to take place in Buffalo on August 3, 1897; and to which resolution was attached a notice, signed by George W. Lamb, secretary, that the meeting would so be held at the office in Buffalo on August 3, 1897, for the purposes specified in the resolution. On July 23, 1897, John P. Wilson wrote the following letter to William Hamlin: "In the matter of the proposed sale of the plant of the American Glucose Company at Peoria, under the contract heretofore executed between said company and the Illinois Trust and Savings Bank, I beg leave to say that all the arrangements have been perfected by the proposed purchasers to complete the purchase and pay for the plant within the time limited by said contract. The uncertainty as to the date of closing the purchase lies in the fact that a number of properties are under contract, the purchase of all of which had to be completed simultaneously. We have not yet received the abstracts of title to some of these plants. These abstracts of title will have to be examined and the titles to all of the plants proposed to be purchased approved before the transaction can be closed,

as it is a ⁶⁰³ single transaction." If this letter, written by the attorney who was most active in promoting and carrying out the scheme for the consolidation of these properties, does not show that the several purchases of all the plants were to be made simultaneously, and together constituted a single transaction, then we fail to understand the meaning of the English language.

On July 26, 1897, Mayer wrote to Hamlin as follows: "I thank you for your very kind letter of the 24th inst. I hope to be able to arrange matters so that the recent destruction by fire to one of the buildings of the Peoria Grape Sugar Company will not interfere with the pending arrangements for the purchase of its property by the new glucose company. My address in New York will be Savoy Hotel, or American Spirits Manufacturing Company, Mills Building." On the same day Mayer wrote to Hamlin in reference to the salaries to be paid by the new company to Henry E. Grant, treasurer, and George W. Lamb, secretary of the American Glucose Company, as follows: "Under existing contracts the time has arrived to determine, as I am advised, what arrangements can be made with your Messrs. Grant and Lamb. As I am told, neither Mr. Grant nor Mr. Lamb seems to be satisfied with the amounts offered, Mr. Grant suggesting that he should receive \$25,000 a year and Mr. Lamb \$10,000 a year. It is, however, important that the new company should, if possible, secure the services of those gentlemen mentioned at salaries not exceeding those fixed by Mr. Matthieson. It is therefore now opportune for you to undertake the office of negotiating, if possible, with Messrs. Grant and Lamb, so that contracts as contemplated can be secured from them."

On July 27, 1897, Mayer wrote to Franklin B. Locke, of Buffalo, an attorney and a director for many years of the American Glucose Company, the following letter: "You ask for the name of the grantee. That has not yet been positively determined, though it is very probable ⁶⁰⁴ that the name will be 'United States Glucose Company.' This matter will be determined, in all probability, some time this week, when it is expected to apply for the charter. The new company will be organized under the laws of New Jersey. It is our intention to have printed contracts uniform, as near as possible, for execution by the different officers of the vendor companies." On the same day, Locke wrote to Mayer as follows: "I now hand you draft of the little agreement promised yesterday. If satisfactory, kindly O. K. it and return it to me, so that I can have

it executed upon being advised of the formation of the new corporation."

The letters thus quoted not only show that the contracts of sale to be executed by the various corporations selling their properties were to be uniform in their terms, but also show that the new company was to silence opposition, as well as competition, by providing places for the officers of the old companies, and by taking from them contracts not thereafter to engage in the manufacture of glucose. The above letter from Locke to Mayer refers to an agreement, under which the Hamlins stipulated not to engage in the business of manufacturing glucose for a certain number of years. This transaction is thus brought within the scathing condemnation of the supreme court of the United States in *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, where it was held not to be "for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital"; and where it was held to be unfortunate for the country to deprive it "of the services of a large number of small but independent dealers"; and where it was held to be "not for the real prosperity of any country that such changes should occur, which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities ⁶⁰⁵ which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others."

About this time, or shortly before this time, Mayer wrote a letter to Hamlin as to the insurance policies upon the property, asking for information in regard to the same, "so that, when the transfers are made to the new company, no time may be lost." He also wrote the following letter: "I want to say that I find on my return this afternoon that the matter is progressing to my entire satisfaction, and I have no doubt whatever that all the transactions can be completed unless some hitch should occur by reason of some defect in the titles, the abstracts of which are now being either brought down to date or examined. Some three have already been completed and delivered to us, and the others are being hastened forward to be completed. We are still waiting for your abstract."

On July 28, 1897, Hamlin wrote to Mayer as follows: "Mr. Grant's connection with us has given him perfect satisfaction

in the past, is satisfactory to him now, and his contract insures him a comfortable living for five years to come. We are satisfied with the contract and intend to carry it out to the letter, unless, at his request, it be terminated before its natural expiration. We feel that some line of business not in competition with the new glucose company will soon be thought of by us in which Mr. Grant's knowledge and abilities will not only enable us to secure satisfactory returns, but will provide him with agreeable occupation and assure him fair pecuniary returns. The price for his services that he named to Mr. Matthieson, while very much in excess of the contract price with us, is not so unreasonable as it might seem at the first blush. In my judgment Mr. Grant is more responsible than any other individual for the condition of affairs that rendered it possible for all parties to give favorable consideration to the consolidation plan. I will ⁶⁰⁶ do that which I can fairly to promote his interests and those of the new company."

On July 29, 1897, John P. Wilson wrote to Locke as follows: "Will you kindly leave the name of the grantee in the contract blank for the present, and I will wire you the name of the grantee in ample time to be inserted before execution." In one of his letters written at this time, William Hamlin says: "Under Mr. Grant's management the capacity of the work was increased over fifty per cent, to 22,000 or 23,000 bushels. The increase of capacity, attended by a process that lessened the cost, enabled the American Glucose Company to produce its products and to sell them at a price that made the business, as a whole, unprofitable, in my opinion, to its competitors. We had lessened the cost of the labor and the cost of fuel, and increased the quantity and bettered the quality of the main and by-products."

On August 2, 1897, Wilson wrote to Locke as follows: "Might it not be well to keep the meeting of board of directors and stockholders alive by adjournment, so that, if any question should arise requiring action, the same might be speedily taken?"

On August 3, 1897, Mayer wrote William Hamlin as follows: "I find that during my absence all the moneys necessary to complete the purchase of the properties by the new company have been paid to the Illinois Trust and Savings Bank, and are now awaiting distribution. While east, the charter of new company was prepared, and was yesterday filed for record at Trenton, so that the new company, the Glucose Sugar Refining

Company, is now in actual existence. The abstracts of title to the six properties have been furnished and have been examined. As you can well imagine, in a deal of this magnitude there are a large number of details to be looked after, as well as instruments of transfer and other contracts to be executed and delivered. These contracts must necessarily all be delivered contemporaneously. We shall be ⁶⁰⁷ able to begin to close the transaction this coming Thursday morning at 10 o'clock, and hope to be able to conclude the entire work during that day, if possible. It is therefore necessary that all of the parties in interest should be in this city at the hour indicated." In reply to this letter, Mayer received the following telegram from Hamlin on August 4, 1897: "I will call on you at your office to-morrow morning."

On August 3, 1897, the meeting of the stockholders of the American Glucose Company was called pursuant to the notice already mentioned. At that meeting, George F. Harding, one of the plaintiffs in error and the stockholder who filed this bill, and who had theretofore written several letters to officers of the American Glucose Company, but had failed to obtain any definite or reliable information as to the proposed sale of the company's plant, made a motion that the stockholders of the company should refuse to ratify the alleged contract for the sale of the Peoria plant of the company to the glucose trust, or corporation, or its representative, upon the grounds that the sale was unlawful, as being prohibited by the statute against trusts of the state of Illinois; and that the creation of a trust in glucose by contract with the company for the purchase and sale of a necessary element in the unlawful combination by such sale was in violation of the powers of the company as given by its charter; and that the contract to relinquish the right to manufacture glucose was against both the right, interests, and powers of the company; and that the price named and made in the offer was grossly inadequate, and that it was not within the powers or duties of the president of the company to make the sale.

At this stage of the proceedings and upon this date, to wit, August 3, 1897, the original bill in this case was filed, and an injunction was obtained. The new company, the Glucose Sugar Refining Company, had only come into existence on the day before the bill was filed. All the ⁶⁰⁸ proceedings, which are now to be detailed, occurred after the filing of the bill in this case, and inasmuch as the American Glucose Company was served with summons August 3, 1897, the transfers and

other transactions hereinafter mentioned were made and took place pendente lite.

By an instrument in writing, dated August 5, 1897, signed by John P. Wilson, Levy Mayer, and J. B. Greenhut, and concurred in in writing on August 7, 1897, by Edwin L. Johnson, hereinafter named, and addressed to the Illinois Trust and Savings Bank of Chicago, the bank was designated as the party of the second part in the option contracts, heretofore referred to and made by the six corporations already named; and said communication to the bank recited that all of said contracts had been deposited by Wilson, Mayer, and Greenhut with the bank, to be held, transferred, and disposed of by it subject to their joint order; and that, in and by all said contracts, it was understood and agreed that the same might be transferred and assigned by the bank; and that, when so transferred and assigned, the said contracts respectively, and all of their respective parts or provisions, should inure to the bank, and should run in favor of, and be obligatory upon, its transferee, and be of the same purport and effect as though such transferee had originally been made second party to the said contracts respectively; and it was further therein recited that it was in all said contracts further provided that, in case of said transfer and assignment by the bank, all of its rights, as well as said obligations under said contracts respectively, whatever the same might be, should forthwith cease and terminate; and after such recitals the said Wilson, Mayer, and Greenhut therein requested that, pursuant to the terms of all said contracts respectively, the bank should forthwith, by proper instruction, transfer and assign all said contracts respectively to Edwin L. Johnson, of Chicago, and all of said contracts, when so transferred and assigned by it to Johnson, should inure to his benefit, ⁶⁰⁹ and run in favor of, and be obligatory upon him to the same purport and effect as though he had originally been made the second party to said contracts respectively.

The Illinois Trust and Savings Bank of Chicago was a corporation, organized under the laws of Illinois for the purpose of doing a banking business, and had no power under its charter to purchase the plants and properties of corporations engaged in the manufacture of glucose and grape sugar. Therefore, the option contracts, providing for a sale of these properties to the bank, were absolutely void. It does not appear that the contracts were signed by the bank, but, when signed by or for the respective corporations, they were accepted and held by the

bank. The bank claims that these contracts were delivered to it to hold in escrow, and that it merely acted for the parties as the repository or custodian of these contracts, subject to be disposed of as the parties might order. The proof tends to sustain the contention of the bank that it was a mere repository of the papers. It went further, however, in its assistance of these parties to carry out their scheme, than merely to act as custodian of the papers.

Attached to each contract of sale was a written assignment thereof by the bank to Edwin L. Johnson, who therein accepts the assignment, and assumes all the obligations created by the contract in favor of the bank. These written assignments, signed by the bank and Johnson, appear to have been dated August 9, 1897, except the assignment on the contract of the American Glucose Company, which was dated August 11, 1897. At least two of the contracts thus signed provided that the proposed corporation should be organized in such state, and in such manner as should be satisfactory to John P. Wilson and Levy Mayer.

A deed, dated August 7, 1897, was executed by the American Glucose Company, by William Hamlin, its president, conveying the plant of the company in Peoria ⁶¹⁰ to Edwin L. Johnson, of Chicago, for an expressed consideration of \$1,750,000, which deed was recorded on August 12, 1897. A deed, dated August 9, 1897, was executed by Edwin L. Johnson conveying the said plant in Peoria to the Glucose Sugar Refining Company of New Jersey for an expressed consideration of \$10, and other good and valuable considerations, which deed was also recorded on August 12, 1897. A deed, dated August 7, 1897, was executed by the Chicago Sugar Refining Company, conveying to said Johnson its plant in Chicago and the real estate on which it was situated, for an expressed consideration of \$6,250,000; which deed was recorded also on August 12, 1897. A deed, dated August 9, 1897, was executed by said Johnson, a bachelor of Chicago, to the Glucose Sugar Refining Company of New Jersey, conveying the same property in consideration of \$10 and other good and valuable considerations. Other deeds were executed by the other corporations to Johnson, and by Johnson to the Glucose Sugar Refining Company. The witnesses testify that these deeds were delivered to the Glucose Sugar Refining Company, or to C. H. Matthieson, its president, simultaneously. The deeds were delivered at the banking office of the Illinois Trust and Savings Bank on the evening of August

11, 1897, at 5:30 o'clock, which was after the regular business hours.

The injunction writ was served upon the American Glucose Company on August 3, 1897; and the injunction was in force until August 11, 1897, when it was dissolved. It will thus be observed that the request of Wilson, Mayer, and Greenhut to the bank to assign the contracts, and the execution of the deeds by the corporations to Johnson, and by Johnson to the Glucose Sugar Refining Company, were all made and effected while the injunction was pending. The option contracts referred to, and the assignments attached thereto, were also delivered by the bank to Johnson on the evening of August 11, 1897, but these and all other papers were at once handed back ⁶¹¹ by Johnson to the bank, and placed in its vaults. Edwin L. Johnson above referred to was a clerk in the law office of John P. Wilson. He never paid a dollar for the purchase of the vast properties which were conveyed to him, nor did he receive a dollar when he conveyed these properties to the Glucose Sugar Refining Company. When he signed the deeds he did not know what he was doing; nor did he know that any deeds were executed to him by these various corporations; nor were any such deeds delivered to him. The testimony of Johnson is in the record, and he says: "I am a clerk in Mr. Wilson's office; . . . never had any connection in any way with the defendants; . . . never received a deed from any of them that I know of, nor from the American Glucose Company, nor authorized anyone to receive one for me; some papers I executed; I don't know whether they were deeds or not; I did not read the papers there; . . . I was acting under instructions of Mr. Wilson; he did not tell me what they were; to my knowledge I never received any deeds." At the taking of the testimony in this case, Wilson made the following statement, which was taken down by the commissioner, and is in the record: "As to Mr. Johnson's testimony, Mr. Johnson was a clerk in my office, and I stated to him in connection with the transfer of the titles of the glucose property, that I should like to have the titles taken in his name, and have him make the conveyance to the new company; he consented, and he signed such papers as I presented to him on my statement that they were all right. His relation was merely acting at my request as the person through whom the title should be conveyed, and having no part in the negotiations whatever. He was present when the deeds were received and delivered, and received the documents. I am not sure whether

the deeds passed into his hands, but I think they did, and this was done in his name with his consent. Mr. Johnson would not be able to state the contents of the documents, not having read them."

⁶¹² Henkel says that all the papers in regard to this transaction that came into the hands of the bank were vouched for by Wilson and Mayer; and that, among the papers so handed to the bank and vouched for by Wilson and Mayer, was a written order, signed by Edwin L. Johnson, and indorsed as correct by Wilson and Mayer, dated Chicago, August 10, 1897, and which is in the following words: "I hand you herewith certificates for 34,500 shares of preferred stock, and 49,285 10-14 shares of common stock, of the Glucose Sugar Refining Company of New Jersey, with which to satisfy and cancel the receipts for money received by you under the underwriters' agreement in regard to said company, and request you to turn over and pay out all money so deposited under the underwriters' agreement as follows, namely: To the American Glucose Company of New Jersey, \$1,977,000; to the American Preservers' Company of West Virginia, \$700,000; to the Glucose Sugar Refining Company of New Jersey, \$773,000; the above amounts include two subscriptions, aggregating \$75,000, upon which you have as yet issued no certificates." What the underwriters' agreement referred to in this order was the record does not show, as Wilson refused to allow the witnesses to testify in regard to it, and refused to allow it to be produced in evidence. That underwriters' agreement was the authority under which the bank received the money and gave the receipts mentioned in the order. The details in the matter were conducted and arranged with the bank by Wilson and Mayer, but, owing to the refusal of the witness to testify at the suggestion of counsel, it is impossible to state what those details were.

On the evening of August 11, 1897, the officials and representatives of the six corporations entering into the consolidation scheme, were present at the Illinois Trust and Savings Bank; and there, upon that occasion, a delivery took place to the parties of the deeds and other documents. A check was there handed to H. E. Grant, ⁶¹³ treasurer of the American Glucose Company, for \$377,000, but not for \$1,977,000. The amount named in the order of August 10th, to wit, \$1,977,000, exceeded the consideration, to wit, \$1,750,000, named in the deed of the American Glucose Company to Johnson, by \$227,000. Why the amount named in the deed was thus increased, or what became of the excess, does not appear.

It appears in the testimony of H. E. Grant and C. H. Matthieson that in the bank on the evening of August 11, 1897, there were present Matthieson and Wilson, representing the Chicago Sugar Refining Company; Ream, representing the Rockford Company; Best and Krause representing the American Preservers' Company; Edward Mayer, representing the Peoria Grape Sugar Company; George Firmenich, representing the Firmenich Manufacturing Company; and Grant, representing the American Glucose Company. Grant says: "The deeds were all delivered there at about the same time. I was paid first, delivered my papers, and took my check. I was called by Mr. Henkel, secretary of the bank. He stood in the middle of the room, and called the American Glucose Company. I delivered the papers, took my check, and went out; don't know who was called next."

An agreement, dated August 11, 1897, the same day on which the delivery of the deeds took place as above stated, was executed between the American Glucose Company, as party of the first part, and the Glucose Sugar Refining Company as party of the second part, which agreement is as follows:

"Whereas, the parties hereto are engaged in the business of manufacturing and selling glucose, grape sugar, starch, and kindred products, and the various products of a glucose factory; and whereas, contemporaneously herewith, the second party has purchased all the real estate, leasehold, buildings, improvements, appurtenances, easements, plant, machinery, fixtures, and utensils belonging to the first party, and situate in the city of Peoria, ⁶¹⁴ etc.; and whereas a valuable and substantial part of the consideration paid by the second party for the property so as aforesaid described was and is the agreement herein contained;

"Now, therefore, in consideration of the premises and of the sum of one dollar (\$1.00) and other good and valuable considerations, the first party hereby covenants and agrees with the second party, its successors or assigns, that the first party shall not and will not, at any time during the period of twenty-five years from and after the date hereof, within a radius of fifteen hundred miles of the city of Chicago, Illinois, engage in the business of buying, manufacturing, or selling glucose, grape sugar, or any of the products now produced by any glucose factory, and the first party shall not, and will not at any time during said period of twenty-five years from and after the date hereof, use in its starch factory at Buffalo the

process commonly known as the 'acid' process, which process is now in general use in glucose factories in this country."

On August 7, 1897, or about that date, the American Glucose Company assigned to Johnson its patents and policies of insurance, and its business and factories at Peoria, and all of its goodwill and its business, etc. On August 28, 1897, at a meeting of a majority of the stockholders of the American Glucose Company at Camden, New Jersey, that company reduced its authorized capital stock from \$1,500,000 to \$150,000, and its stock actually issued from \$1,322,500 to \$132,250, and ratified the action taken at the other meeting on August 3, 1897, and ratified the action of the president and directors in selling the plant at Peoria to Edwin L. Johnson of Chicago. The action, taken at Buffalo, New York, on August 3, 1897, was taken in New York by the stockholders of a New Jersey corporation. It has been recognized as a general rule by this court that the power of a corporation to perform corporate acts outside of the state of its creation, ⁶¹⁵ and where the laws of its corporate existence have no force, does not exist: *Bastian v. Modern Woodmen*, 166 Ill. 595. As to the attempted ratification of the alleged sale to Edwin L. Johnson, it has already been shown that there was no sale to Johnson.

2. A question of law, which arises in the case, is whether the facts set up in the bill constitute an illegal trust. The pleadings in the case are in a somewhat singular condition. Some of the defendants answered the bill. One of the defendants to the amended bill filed a paper, which was in part an answer, and in part a demurrer. Others of the defendants demurred to the whole bill. All the demurrers, both in whole and in part, were sustained by the trial court. We are of the opinion that they should have been overruled.

A trust has usually appeared in the form of an agreement between stockholders in many corporations to place all their stock in the hands of trustees, and to receive trust certificates therefor from the trustees. But the question in the present case is, whether a trust is created where a majority of stockholders consolidate their interests by conveying all their property to a corporation, organized for the purpose of taking their property. Any combination of competing corporations for the purpose of controlling prices, or limiting production, or suppressing competition, is contrary to public policy, and is void: 2 Cook on Corporations, 4th ed., sec. 503 a. It makes no difference whether the combination is effected through the instru-

mentality of trustees and trust certificates, or whether it is effected by creating a new corporation and conveying to it all the property of the competing corporations. The test is, whether the necessary consequence of the combination is the controlling of prices, or limiting of production, or suppressing of competition, in such a way as thereby to create a monopoly. The demurrers confess the truth of the allegations in the bill; and those allegations are, that a trust was created, ^{¶16} or proposed to be created, by the organization of a new corporation and the conveyance thereto of all the property owned by the six competing corporations, and the execution of agreements by the corporations, thus parting with their property, not any longer to engage in the manufacture of the industrial products in which they had been previously engaged. Six corporations were engaged in the manufacture of glucose, which can only be manufactured in a certain district or extent of country, and, with the exception of one small plant, were the only corporations engaged in such business. The allegations of the bill show that the ability to prosecute such business was rare, and that it is difficult for new parties, not familiar with it, to engage in it. Necessarily, when corporations thus situated unite together all their properties in one new organization, and permit the latter to operate their properties, competition will be suppressed, and the new corporation will possess the power to limit production and control prices. All the competing corporations have been put out of the business by disposing of the plants with which they conducted their business. The grantee of said corporations has no competitor in the market.

The public policy of a state is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts, and in the constant practice of government officials. When the legislature speaks upon a subject upon which it has the constitutional power to legislate, public policy is what the statute passed by it indicates: *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290. The public policy of the state of Illinois has always been against trusts and combinations, organized for the purpose of suppressing competition and creating monopoly.

In *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 158, we held it to be a well-settled rule of law that an agreement in general restraint of trade is contrary to public policy, and is illegal and void.

⁶¹⁷ In *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, we forfeited the charter of a company, on the ground that it was formed to bring about an illegal combination; and held that an agreement, tending to prevent competition and create a monopoly, is void by the principles of the common law, because it is against public policy; and that public policy favors competition in trade, and is opposed to monopoly, as tending to advance market prices to the injury of the general public.

In *More v. Bennett*, 140 Ill. 69, 33 Am. St. Rep. 216, we held again that contracts restraining the freedom of trade, diminishing competition, or regulating the prices of commodities, are prohibited by law; and that all combinations of capitalists and of workmen in their especial favor, by raising or reducing the prices, are so far illegal, and that agreements to combine for such purposes will not be enforced by the courts.

Again, in *Bishop v. American Preservers' Co.*, 157 Ill. 284, 48 Am. St. Rep. 317, we held that an agreement providing for the welding together of all the interests, engaged in a certain business, in one giant combination under the absolute dominion and control of a board of trustees, was void as contrary to public policy.

It makes no difference that the agreement for the illegal combination is not a formal written agreement. It may be a verbal agreement or understanding, or a scheme not embodied in writing, but evidenced by the action of the parties. In the present case, each of six corporations, engaged in the manufacture of glucose, made a contract to sell its plant to a new corporation to be organized, and agreed not to engage in such manufacture for a term of years, and then conveyed all its property to the new corporation organized to conduct the same kind of business; and it did all this with the knowledge and understanding that each of five other competing corporations was making the same kind of contract, and executing the same ⁶¹⁸ kind of conveyance in respect to their own respective properties, all to be consummated and delivered at the same time, and under the direction and management of agents or promoters employed by all the corporations. If the transactions referred to in the bill in this case did not amount to an absolute agreement made in advance between the six corporations, they at least constituted a scheme understood by all the corporations, and participated in by them all. The carrying out of the scheme, thus understood and participated in, would necessarily

result in the suppression of competition in the manufacture of glucose, and in the creation of a monopoly in that business. A part of the scheme was, that none of the six corporations or their officers should, for years, engage in the manufacture of glucose, and this feature of the scheme necessarily contemplated a wiping out of all competition in the business.

In *Distilling etc. Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, we held that a combination to control the manufacture and sale of all distillery products, so as to stifle competition and regulate and dictate prices, was an illegal attempt to create a monopoly, and that an organization, which has a tendency to create a trust and constitute a monopoly, is contrary to public policy and unlawful. In the latter case, it was claimed that the illegal character of the combination was removed by a change of organization, so as to have the properties of the combining distillery companies transferred directly to the new corporation organized for that purpose; but it was held that this change was formal rather than substantial, and that the same interests were controlled by the same agencies as had controlled them under the former organization. So it is in the case at bar; the men who control the new corporation, which was organized, to wit, the Glucose Sugar Refining Company, are the same men, for the most part, who were interested in and controlled some one or more of the six corporations which disposed of their plants. Many of ⁶¹⁹ the stockholders in the old corporations are holders of stock in the new corporation.

In *Distilling etc. Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, this court spoke with approval of the case of *Richardson v. Buhl*, 77 Mich. 632; and in the Michigan case, it appeared that the corporation known as the Diamond Match Company was organized to manufacture, buy, sell, and deal in friction matches, etc., and that the real object of the corporation was to buy up the property of all the corporations, or of individuals, engaged in the manufacture of friction matches, exacting from the seller in the several cases a bond that he would not for a term of years engage in, or aid anyone else in, the manufacture of matches in any place where his action might conflict with the interests, or diminish the profits of the Diamond Match Company; and in that case the purposes of the company were declared to be unlawful, and it was held that any contract made to further them was void as against public policy. In *Distilling etc. Co. v. People*, 156 Ill. 489, 47 Am. St. Rep. 200, we used, in reference to this Michigan case, the following language: "It

was held that a corporation, organized for the purpose of controlling the manufacture and sale of friction matches, and by means of which all competition was stifled and opposition crushed, and the whole business of the country in that line engrossed by the corporation, was a menace to the public, its object and direct tendency being to prevent fair competition and to control prices; that it is no answer to say that the monopoly had in fact reduced the prices of friction matches; that such policy may have been necessary to crush competition; that the fact exists that it rests in the discretion of the corporation to raise prices at any time to an exorbitant degree; and that such combinations have frequently been condemned by courts as unlawful and against public policy."

The material consideration in the case of such combinations is, as a general thing, not that prices are raised, ⁶²⁰ but that it rests in the power and discretion of the trust or corporation taking all the plants of the several corporations to raise prices at any time, if it sees fit to do so.

It does not relieve the trust of its objectionable features that it may reduce the price of the articles which it manufactures, because such reduction may be brought about for the express purpose of crushing out some competitor or competitors.

In the case at bar, however, the proof shows that, upon the completion of the new organization, and as soon as it began to operate the several plants conveyed to it, the price of glucose and its various products began to go up. One of the witnesses testifies that, in May, 1897, the price of glucose was about \$.75 per 100 pounds, and that after that it began to go up, and went as high as \$1.65 per 100 pounds.

The public policy of this state in regard to this matter is not only manifested by the decisions of the supreme court of the state as already referred to, but by the legislation of this state. By an act approved June 11, 1891, the legislature of Illinois enacted that "if any corporation organized under the laws of this or any other state for transacting or conducting any kind of business in this state, or any individual or other association of persons whosoever, shall create, enter into, become a party to any pool, trust, agreement, combination, confederation, or understanding with any other corporation, individual, or any other person, or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of, or a party to, any pool, agreement, contract, combination, or confederation

to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in this state, such corporation . . . or individual or other association of persons shall be deemed and ⁶²¹ adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this act." Section 2 of the act provides that "it shall not be lawful for any corporation, . . . agent, officer, or employes, or the directors or stockholders of any corporation to enter into any combination, contract, or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract, or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use, or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article." Section 3 provides that, if a corporation or a company, firm, or association shall be found guilty of a violation of the act, it shall be punished by a fine running from \$500 to \$15,000, according to the number of times the offense is committed. Section 4 of the act provides that any president, manager, director, or other officer or agent or receiver of any corporation or association, or any member of any company or association, or any individual, found guilty of a violation of the first section of the act, may be punished by a fine of not less than \$200, nor to exceed \$1,000, or be punished by confinement in the county jail, not to exceed one year, or both, in the discretion of the court, etc. Section 5 of the act provides that any contract or agreement in violation of any provision of the first four sections of the act shall be absolutely void.

This act of June 11, 1891, came under the consideration of this court in *Ford v. Chicago Milk Shippers' Assn.*, 155 Ill. 166, and was there held to be constitutional: Ill. Sess. Laws, p. 206.

The demurrers admit the allegations of the bill to be true. The American Glucose Company, a corporation organized ⁶²² under the laws of the state of New Jersey, for transacting business in Illinois, and the other persons whose names appear in the record, created and entered into a trust or combination with themselves, and with one or more of the five corporations other than the American Glucose Company, who conveyed their

plants to the Glucose Sugar Refining Company, and with the Glucose Sugar Refining Company, to regulate and fix the price of glucose and grape sugar and their products and by-products; and they also entered into such combination to fix or limit the amount or quantity of glucose to be manufactured, produced, or sold in this state. These parties, therefore, under the act were guilty of a conspiracy to defraud. The testimony tends to sustain the allegations of the bill. James A. Lamon says: "The price of glucose has been within thirty or sixty days past \$1.00 (per 100 pounds). . . . The price is made, as I understand it, by Pope and by the combination. As I understand it at the present time, the glucose is \$1.35, I believe, and twenty-five, or a quarter of a cent a hundred, rebate made at the expiration of six months to the purchaser. That is by this trust or combination." L. G. Yoe testifies: "Our last purchase was made of the Glucose Sugar Refining Company on the first of this month (October or November). The price was \$1.25. We were to have a rebate at the end of six months on condition of dealing exclusively with them." The evidence shows that efforts were made to induce Pope to go into the combination and transfer his plant or manufactory to the Glucose Sugar Refining Company. When Pope was on the stand as a witness in this case, and declined, under instructions from Wilson, to state whether or not he was manufacturing glucose at all at that time, or whether he had ever sold glucose, or whether he had manufactured much glucose during the preceding two years, he stated that he had had negotiations with Wilson, and with parties claiming to represent a combination⁶²³ or union of factories, but declined to state what price Wilson offered him for his factory.

By the act approved June 20, 1893, in regard to trusts and combines, the legislature of Illinois enacted: "That a trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of two or more of them for either, any, or all of the following purposes: 1. To create or carry out restrictions in trade; 2. To limit or reduce the production, or increase or reduce the price of merchandise or commodities; 3. To prevent competition in the manufacture, making, transportation, sale, or purchase of merchandise, produce or commodities; 4. To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, upon any article or commodity of merchandise, produce, or manufacture intended for sale, use, or consumption

in this state; or to establish any pretended agency whereby the sale of any such article or commodity shall be covered up and made to appear to be for the original vendor, for a like purpose or purposes, and to enable such original vendor or manufacturer to control the wholesale or retail price of any such article or commodity after the title to such article or commodity shall have passed from such vendor or manufacturer; 5. To make or enter into, or examine or carry out any contract, obligation, or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or card or list price, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or ⁶²⁴ others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interests they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected." Section 2 of the act of 1893 provides that any corporation, holding a charter under the laws of this state, which shall violate any provision of the act, shall forfeit its charter and franchise. Section 4 provides that any foreign corporation, violating any provision of the act, is thereby denied the right and prohibited from doing any business in this state. Section 5 provides that "any violation of either or all of the provisions of section 1 of this act shall be and is hereby declared to be a conspiracy against trade, and a misdemeanor; and any person who may be or may become engaged in any such conspiracy or take part therein or aid or advise in its commission, or who shall as principal, manager, director, agent, servant, or employé, or in any other capacity knowingly carry out any of the stipulations, purposes, prices, rates, orders thereunder, or in pursuance thereof shall be punished by fine not less than \$2,000 nor more than \$5,000." Section 6 provides that, in any indictment for any offense under the act, it shall be sufficient to state the purposes and effects of combination, and that the accused was a member of, and acted in pursuance of it, without giving its name or description, etc. Section 7 provides that in prosecutions under the act it shall

be sufficient to prove that a trust or combination as defined therein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it might have been based, or that it was evidenced by any written instrument at all. Section 8 provides that any contract or agreement in violation of the act shall be absolutely void and not enforceable either in law or in equity.

625 The bill in this case most certainly contains allegations in regard to the existence of a combination of capital and acts by two or more persons and corporations to prevent competition in the manufacture of glucose and grape sugar and their products and by-products, and to create and carry out restrictions in trade, which allegations bring the transactions referred to in the bill within the scope and meaning of section 1 of the act of 1893. Therefore, the demurrers were improperly sustained to the bill.

3. Counsel for the Glucose Sugar Refining Company claim, however, that the demurrer was properly sustained to the bill, upon the ground that a stockholder has no right to file such a bill as this. The position of counsel is, that a stockholder can only file a bill to prevent the corporation from disposing of its properties, upon the ground that it will affect his pecuniary interests, and because of the necessity of protecting his property rights, and because of the necessity of protecting himself from pecuniary loss or injury; and that a stockholder in a vendor corporation has no right to enjoin a sale and transfer of a factory, owned by such vendor, upon the ground that the vendee corporation proposes to create a monopoly in the manufacture of glucose, and to use the property sold to that end, the vendor being charged to have knowledge thereof. It is said that a stockholder does not represent the public, and has no right to maintain a bill to protect the public interests, or to prevent a violation of the law against trusts and combines. This contention assumes that the creation of a trust and monopoly, as described in the bill, will work no injury to the stockholder filing the bill. In support of this contention counsel rely mainly upon the cases of *Cope v. District Fair Assn. of Flora*, 99 Ill. 489, 39 Am. Rep. 30, and *Coquard v. National Linseed Oil Co.*, 171 Ill. 480.

In *Cope v. District Fair Assn. of Flora*, 99 Ill. 489, 39 Am. Rep. 30, the bill was filed by a stockholder in an incorporated

fair association ⁶²⁶ to restrain the company and its officers from permitting, for a pecuniary reward, gamblers to congregate and ply their vocation upon the grounds of the company during its annual exhibitions; but it did not appear there, from the bill or otherwise, that the complainant therein or the company had thereby sustained any pecuniary injury or loss. Here, the demurrer admits the allegations of the bill to be true, and the bill alleges that the proposed action of the American Glucose Company and its directors in disposing of its property will destroy the value of the complainants' stock therein, and will destroy the property and business of the glucose company, and irreparably injure the complainants; and that their stock will be reduced in value to less than one-twentieth of its cost. Moreover, the bill expressly refers to the acts of 1891 and 1893 above set forth; and the latter act provides for a forfeiture of the charter and franchise of any corporation violating the provisions of the act, and the dissolution of its corporate existence. It is idle to say that a stockholder in a corporation would suffer no injury from a forfeiture of its charter rights and from its dissolution. In such a case, the corporation being destroyed, his stock therein would be completely wiped out, and be made of no effect. The stockholder has a right to protest against such use of its property by the managing officers of a corporation, as will lead to such forfeiture and dissolution. But the matter complained of in the Cope case did not relate to any disposition of the corporate property, but related merely to a license given by the association to outside parties permitting them to gamble. The case is not on all fours with the present case in any particular.

As to the case of *Coquard v. National Linseed Oil Co.*, 171 Ill. 480, the main object of the bill there was to enjoin the officers of a corporation from interfering with the right of a stockholder to examine its books, etc. It would also appear that, in that case, the prayer of the bill was that the corporation ⁶²⁷ should be wound up, and its charter should be forfeited; and it was held that such forfeiture, for injury to the public and to its rights, could only be enforced by the state. In the case at bar, the bill does not seek the forfeiture of the charter. Moreover, it was alleged there that the stockholder filing the bill had, for anything that had appeared to the contrary, participated in the illegal acts of which he complained, and for a number of years had full knowledge of the occurrences which he recited; and it was there said that his participation or laches

of many years barred him from obtaining relief on his own account. In that case, the main ground upon which the decision of the court was based was that, in order to entitle himself to relief against the formation and operation of an illegal trust, the complaining stockholder must be free from participation in such illegality, and cannot take personal advantage thereof, when he has been guilty of acquiescence and long delay. The Coquard case is not applicable here. The bill here alleges, and the proof shows, that the dissenting stockholder, who filed the bill, vainly sought information from the officers of the American Glucose Company as to what they proposed to do in the matter of organizing a trust and disposing of its property thereto. The bill and proofs show that the stockholder filing this bill attended the meeting of stockholders, held at Buffalo, August 3, 1897, for the purpose of taking action in reference to relinquishing the manufacturing of glucose and grape sugar, and selling the plant and property of the company; and that he there protested against such action on the part of the company, and presented a motion that the stockholders should refuse to ratify the offer and proposed contract for the sale of its Peoria plant. So far from acquiescing in the illegal action of the corporation, the plaintiff in error, Harding, did all that he could to defeat and prevent such action, and did this at once and without delay.

628 It must be remembered that here the pecuniary interest of the complaining stockholder was to be, and was, affected by the sale of the entire property of the American Glucose Company against his consent, and by the abandonment of its charter business against his consent, and by the utter inability of the corporation to make money or win profits, which necessarily resulted from such a sale, and from a contract not to further engage in the charter business, notwithstanding the American Glucose Company was a solvent and going concern, and doing and able to continue to do a profitable business. The shares of stock owned by a stockholder, derive their value from the corporate property and franchise, although the stockholder's legal property in his stock is distinct from the property of the corporation: *Porter v. Rockford etc. R. R. Co.*, 76 Ill. 561. If the shares derive their value from the corporate property and franchise, they will have no value practically, when all such corporate property is disposed of, and the right to carry on business is destroyed. What was here attempted was an abandonment of the business and a sale of the assets without legal termination

or dissolution of the company. It makes no difference that the stockholder is to be allowed to receive his proportionate share of the proceeds of the sale of the property. He has the right to hold his investment in the form of stock, and a change of such investment against his consent is a change which affects his pecuniary or financial interests. He has the right to be the judge, whether such a change in his pecuniary status shall be made, or whether he shall continue his investment in the form of stock.

The bill in this case recites that the complainants therein filed it, not only in their own behalf, but in behalf of all other stockholders who might see fit to come into the suit and join therein. Where the officers of a corporation wrongfully deal with its property to the injury of the stockholders, the latter may maintain a bill against ⁶²⁹ the company and its officers for relief against such misappropriation. Originally, the rule was that such a suit should be brought by the corporation itself; but equity permits a stockholder, either individually or on behalf of other stockholders similarly situated, to bring such a suit, where the corporation itself either refuses to do so, or where the facts show that the wrongdoing defendants constitute a majority of the managing body, or where it is reasonably certain that a demand made upon the proper officers of the corporation to bring the action would be unavailing: *Green v. Hedenberg*, 159 Ill. 489, 50 Am. St. Rep. 178; *Bruschke v. Nord Chicago Schuetzen Verein*, 145 Ill. 433. Here the bill alleges, and the proof shows, that the officers and directors of the American Glucose Company and the majority of its stockholders were in favor of disposing of its property to the new corporation to be formed, and that they adopted a resolution to carry out such action against the protest of Harding. Therefore, no previous demand upon the managing officers to bring this suit would have been availing. It follows, however, that where the bill in such case is filed by the stockholder, the final relief, when obtained, belongs to the corporation and all its stockholders, and not alone to the stockholder complaining. In view of this fact, Pomeroy in his work on Equity Jurisprudence, section 1095, says: "This view completely answers the objection, which is sometimes raised in suits of this class, that the plaintiff has no interest in the subject matter of the controversy nor in the relief. In fact, the plaintiff has no such direct interest; the defendant corporation alone has any direct interest; the plaintiff is permitted, notwithstanding his want of interest, to

maintain the action solely to prevent an otherwise complete failure of justice." Morawetz, in his work on Private Corporations, section 271, says: "A corporation and its shareholders are identical. . . . Obviously, then, any injury to a corporation must be an injury to its shareholders; and it follows that subject to the limitations that have ⁶³⁰ been pointed out, a shareholder is entitled to relief in equity on account of any wrong constituting an infringement of the corporate rights."

The views above expressed are abundantly sustained by authority. In *Stewart v. Erie etc. Transp. Co.*, 17 Minn. 372, the supreme court of Minnesota said: "We agree with the plaintiff's counsel, and with the cases by him cited, that it is against the general policy of the law to destroy or interfere with free competition. . . . An unauthorized monopoly, is, therefore, against public policy as destroying and interfering with free competition. . . . If a corporation is employing its statutory powers, funds, etc., for purposes not within the scope of its institution, a court of equity will, upon the application of a single dissentient stockholder, interfere by injunction. . . . The right of a stockholder to this interference seems to be placed upon the ground that, from the fact that the corporation was created for certain purposes, there is an implied contract that it shall not divert its powers or funds to other purposes, and that such diversion would be a species of breach of trust as well as a violation of law, which might endanger the existence of its charter. But it is to a dissentient stockholder that the relief is granted, and to a stockholder who comes with diligence to assert his rights. . . . There is no good reason, of which we can conceive, why the plaintiff's right to maintain this action should stand upon any different footing because the contract provides for a monopoly, or because it is simply ultra vires. In either case, the contract is illegal. . . . Defendant's objection that the complaint does not state a cause of action, because no facts are alleged going to show that he will suffer any pecuniary damage in consequence of the contract complained of, is not well taken, not only because the complaint alleges that the effect of the contract, if carried out, will be to render plaintiff's stock worthless, but because, if the contract is illegal, as ⁶³¹ alleged, it may lead to a total forfeiture of the charter of the company in which plaintiff is a stockholder."

In *Small v. Minneapolis Electro-Matrix Co.*, 45 Minn. 264, the court said: "We need not inquire how far, or under what circumstances, considerations of public policy and of the gen-

eral interests of the state may affect the right of a corporation to discontinue the business for which it was created, and to surrender to another corporation its property and the conduct of such business. We do decide that such a surrender of the property, and, so far as possible, of the functions of a corporation in order that, while it is to still continue in existence, its business may be carried on by another corporation, to which such transfer is made, would violate the rights of a nonassenting stockholder, arising from the contract implied, if not expressed, in the creation of such an organization; and he would be entitled to have such acts restrained by injunction": See, also, *Abbott v. American Hard Rubber Co.*, 33 Barb. 578; *People v. Ballard*, 134 N. Y. 269.

In the fourth edition of *Cook on Corporations*, sections 669, 670, it is said: "That a charter constitutes a contract between the corporation and its stockholders is a principle of law that has become firmly imbedded in the jurisprudence of modern times. . . . Any act or proposed act of the corporation, or of the directors, or of a majority of the stockholders, which is not within the expressed or implied powers of the charter of incorporation, or of association—in other words, any *ultra vires* act—is a breach of the contract between the corporation and each one of its stockholders, and consequently any one or more of the stockholders may object thereto, and compel the corporation to observe the terms of the contract as set forth in the charter. . . . Ever since the case of *Abbott v. American Hard Rubber Co.*, 33 Barb. 578, the law has been clearly established in this country, that a dissenting stockholder may prevent the sale of all the corporate property by the directors, or by a majority of the ⁶³² stockholders, where the corporation is a solvent, going concern. And even where a dissolution is the purpose in view, yet, if the corporation is a prosperous one, such a sale cannot be made. If the purpose of such dissolution is not the bona fide discontinuance of the business, but is the continuance of that business by another new corporation, then the rule is that a dissenting stockholder may prevent the sale, even though it is made with a view to dissolution of the corporation. . . . Such a dissolution is practically a fraud on dissenting stockholders. It seeks to do indirectly what cannot legally be done directly."

The allegations of the bill in this case, as well as the answer of the Glucose Sugar Refining Company, and the testimony taken in the case, show that the property of the American Glu-

cose Company was passed over to a new corporation, to wit, the Glucose Sugar Refining Company; and that the latter company was to continue the business, theretofore prosecuted by the American Glucose Company, which was a solvent concern and doing a profitable business. There is no reason why the American Glucose Company should not have continued to prosecute its own business, instead of turning it over to be prosecuted by a new corporation, unless the officers, directors, and stockholders, making the transfer to the new corporation, expected, by suppressing competition, to fix and control prices, and thereby increase their own profits to the injury of the consumers of the manufactured products and of the public generally. It must be remembered that these transfers of properties were not made by the six corporations to a corporation already existing and doing business, but a new corporation was to be created, and was created, for the express purpose of taking and using the properties to be conveyed to it. All the arrangements for the several transfers were made before the new corporation was allowed to come into existence. The only purpose of its existence was to take and use, in ⁶³³ a consolidated form, all the plants of the six old corporations. The illegal trust or combination was formed, not after the making of the sales, but by the sales themselves.

The contention of counsel for the Glucose Sugar Refining Company, that the American Glucose Company had a right to make a sale of its plant to the new corporation, and that this transaction must be regarded by the court merely as a valid sale, is not supported by the allegations of the pleadings, or by the proofs herein. The transfer of its property, made by the American Glucose Company, was a transfer to a corporation, created for the express purpose of taking its property and the property of other corporations, so as to use them in the suppression of competition, and in the creation of a monopoly in the manufacture of glucose, and grape sugar, and their products and by-products. The whole scheme, as devised and consummated, was a fraud not only on the public, but upon the dissenting stockholder filing this bill. We are, therefore, of the opinion that the bill was not demurrable because brought by a stockholder, and that the court below erred in sustaining the demurrer, if it was sustained upon that ground alone.

4. It is claimed by counsel that, inasmuch as the American Glucose Company is a corporation organized under the laws of the state of New Jersey, this bill will not lie. Counsel for de-

pendants below introduced in evidence sections from 6 to 32 of an act of the legislature of New Jersey concerning corporations, passed in 1896, after the American Glucose Company was incorporated, which was in 1883. Section 27 of the act in question provides that every corporation organized under that act may change the nature of its business, increase and decrease its capital stock, etc., in the manner provided for in that section. Section 28 of the act provides that any corporation, whether organized under a special act of incorporation, or under general laws, with certain exceptions, may relinquish one or more branches of its business. ⁶³⁴ It is claimed that, under said sections 27 and 28, the American Glucose Company was authorized, under the laws of the state which gave it its charter, to do the acts which have been heretofore referred to and set forth; and that, by reason of its being a foreign corporation, this state cannot entertain a bill which seeks to inquire into the manner in which its directors manage its affairs and exercise its charter powers. The bill alleges, and the proof shows, that the American Glucose Company owned a plant, consisting of real estate and buildings thereon, together with the machinery, fixtures, etc., therein, situated in the city of Peoria in this state, and that it operated said plant in this state, and therewith conducted the business of manufacturing glucose and grape sugar. Being a foreign corporation, thus owning property and doing business in this state, it is subject to the same regulations and restrictions which apply to corporations organized under a charter granted by the state of Illinois. Section 26 of the Illinois act in regard to corporations provides that "foreign corporations, and the officers and agents thereof, doing business in this state shall be subjected to all the liabilities, restrictions, and duties that are or may be imposed upon corporations of like character, organized under the general laws of this state, and shall have no other or greater powers. And no foreign or domestic corporation, established or maintained in any way for the pecuniary profit of its stockholders or members, shall purchase or hold real estate in this state, except as provided for in this act." Section 5 of the Illinois act in regard to corporations provides that corporations, formed thereunder, "may own, possess, and enjoy so much real and personal estate as shall be necessary for the transaction of their business, and may sell and dispose of the same when not required for the uses of the corporation." As foreign corporations and their officers and agents, doing business in this state, are subject to the lia-

bilities and restrictions of domestic corporations ⁶³⁵ of like character, and as domestic corporations are allowed to sell and dispose of the real and personal property used by them for the transaction of their business, when not required for the uses of the corporation, it follows that foreign corporations may sell and dispose of the real and personal estate necessary for the transaction of their business, when the same is not required for the uses of the corporation. There is no allegation in the pleadings in this case, and no testimony tending to prove, that the property of the American Glucose Company at Peoria was not required for the uses of that company. On the contrary, the proof tends to show that the property was required by the company for the business there conducted. As has already been stated, the company was in a solvent condition, and was doing a prosperous business; the disposition made of its property to a gigantic trust with a capital stock of \$40,000,000, was such a disposition as was not authorized by the statute. The act of 1891, which has already been set forth, applies to foreign corporations as well as to domestic corporations; and the act of 1893, above set forth, by providing in section 44 that every foreign corporation violating any provision of that act shall be denied the right to do business within this state, impliedly requires the obedience of all foreign corporations, doing business in this state, to the provisions of that act.

It is the settled doctrine of this state, established by many decisions of this court, that foreign corporations do not come into this state as a matter of legal right, but only by comity, and that said corporations are subject to the same restrictions and duties as corporations formed in this state, and have no other or greater powers: *Hazelton Boiler Co. v. Tripod Boiler Co.*, 142 Ill. 494; *Pennsylvania Co. v. Bauerle*, 143 Ill. 459; *Bishop v. American Preservers' Co.*, 157 Ill. 284, 48 Am. St. Rep. 317; *Farmers' Loan Co. v. Elevated Railroad Co.*, 173 Ill. 439; *Freie v. Fidelity Building Union*, 166 Ill. 128, 57 Am. St. Rep. 123; *Rhodes v. Missouri Sav. Co.*, 173 Ill. ⁶³⁶ 621. In *Distilling etc. Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, where the defendant corporation was organized to monopolize the business of manufacturing and selling all distillery products, and the various plants and properties used in that business were transferred to the defendant corporation, we said: "The defendant is authorized to own such property as is necessary for carrying on its distillery business, and no more. Its power to acquire and hold property is limited to that purpose,

and it has no power, by its charter, to enter upon a scheme of getting into its hands and under its control all, or substantially all, the distillery plants and the distillery business of the country for the purpose of controlling production and prices, of crushing out competition, and of establishing a virtual monopoly in that business. Such purposes are foreign to the powers granted by the charter. Acquisitions of property to such extent and for such purpose do not come within the authority to own the property necessary for the purpose of carrying on a general distillery business." This language applies both to the American Glucose Company and to the Glucose Sugar Refining Company. Foreign corporations cannot be permitted to come into this state for the purpose of asserting rights in contravention of our laws: *Hazelton Boiler Co. v. Tripod Boiler Co.*, 142 Ill. 494.

In *Pope v. Hanke*, 155 Ill. 617, it was held that comity between different states does not require a law of one state to be executed in another, when it will be against the public policy of the latter state; that no state is bound to recognize or enforce contracts which are injurious to the welfare of its people, or which are in violation of its own laws; and that a contract made in one state will not be enforced in another when, to do so, would contravene the criminal laws of the latter state, or would be against the express prohibition of its laws. This same doctrine was also announced in *Rhodes v. Missouri Sav. Co.*, 173 Ill. 621.

⁶³⁷ The proof shows that nearly all the parties organizing and engineering the illegal combination known as the Glucose Sugar Refining Company were citizens of Illinois; and that four of the corporations which transferred their property to the Glucose Sugar Refining Company were operating their plants in Illinois at Peoria, Rockford, and Chicago. Citizens of Illinois cannot evade the laws of Illinois passed against trusts and combines, and defy the public policy of the state by going into a foreign state, and chartering a corporation to do business in this state in violation of its laws. When these foreign corporations come into this state to do business, they must conform to the laws and public policy of this state. Moreover, the property transferred to Johnson, and through him to the Glucose Sugar Refining Company, consisted largely of real estate, located in Illinois, and nothing is better settled than that the validity of all transactions relating to land depends upon the laws of the state where the land is situated: *Wunderle v. Wun-*

derle, 144 Ill. 40. If real estate in Illinois, owned by domestic corporations, cannot be used for the purpose of carrying out the business of an illegal trust or combination, real estate in Illinois, owned by a foreign corporation, cannot be used for such a purpose.

We are, therefore, of the opinion that the fact that the American Glucose Company and the Glucose Sugar Refining Company were foreign corporations does not militate against the power of the courts in this state to grant relief under such a bill as is filed in this case.

5. One of the features of the transaction, by which the property of the American Glucose Company was taken from it, is the contract entered into on August 11, 1897, between that company and the Glucose Sugar Refining Company. This contract indicates clearly that the object of the whole scheme was to suppress competition in the manufacture of the products referred to, and to create a monopoly therein. By the terms of that ⁶³⁸ agreement, the American Glucose Company agreed that it would not, at any time during the period of twenty-five years from that date, within a radius of 1,500 miles of Chicago, engage in the business of buying, manufacturing, or selling glucose, grape sugar, or any of the products produced by any glucose factory; and it was therein recited that the agreement so to refrain from engaging in such business for the period named was a part of the consideration paid by the Glucose Sugar Refining Company for the purchase of the property of the American Glucose Company. Contracts in total restraint of trade are void; but contracts in restraint of trade are valid, and will be enforced, where the restraint is reasonable, partial, and founded upon a good consideration. In other words, all contracts made in general restraint of trade are void. A contract to refrain from trade throughout an entire state has been held to be general and illegal, while limitation to a particular place is allowable. It has, however, been held that some callings would be treated as being under general restraint, if inhibited by contract throughout the state, while others would not: 3 Am. & Eng. Ency. of Law, 882; 9 Am. & Eng. Ency. of Law, 884-888. Where a contract in restraint of trade is general not to pursue one's trade at all, or not to pursue it in the entire realm or country, the contract is clearly against public policy, and as such is void: Beach on Monopolies and Industrial Trusts, sec. 37, p. 114. In *Hursen v. Gavin*, 162 Ill. 377, we said: "Undoubtedly, contracts in total restraint of trade are void.

.... A contract in restraint is thus total and general, when, by it a party binds himself not to carry on his trade or business at all, or not to pursue it within the limits of a particular country or state."

The evidence shows that the manufacture of glucose and grape sugar and their products is confined to a certain "corn belt," where corn is raised, and that this district is embraced within the territory specified in the ⁶³⁹ contract of August 11, 1897; that is to say, within a radius of 1,500 miles of Chicago. As the evidence in this record tends to show that glucose can only be manufactured successfully within this radius, the agreement not to manufacture and sell it therein amounted, in effect, to an agreement in total or general restraint of trade; hence, the agreement was void, and stamps the transaction, of which it was a part, as illegal.

6. The question arises, What is the proper judgment to be rendered by this court in this case? As has already been stated, the Glucose Sugar Refining Company filed a demurrer to a part of the bill and an answer to a part. The demurrer was directed against such parts of the bill as alleged the sale of the property of the American Glucose Company to be a part of one general transaction, which involved the sales of the properties of five other corporations. The answer purports to be directed to those parts of the bill which specify other features of the transfer of the property of the American Glucose Company outside of the connection of such transfer with the other transfers in question. The main relief sought by the bill is the setting aside of the transfer of the property of the American Glucose Company. It matters not that such transfer is sought to be set aside on several grounds. The relief is the same whatever ground may be relied upon. The answer sets up the fact that the American Glucose Company is a corporation organized under the laws of New Jersey for the purpose of engaging in the business of manufacturing glucose, etc., and other products of corn in Illinois; it then proceeds to set up the execution of the deeds of the American Glucose Company to Johnson, and of Johnson to the Glucose Sugar Refining Company; and it then alleges that the latter company paid cash for the premises at the date of the delivery of said deeds. The bill had alleged that the method of the pool or combination was to swallow up or merge therein the plants engaged in such business in ⁶⁴⁰ the United States by issuing to the several corporations theretofore operating that business stock in the said pool or com-

bine or in said trust or corporation; and that, where this method failed, its method was to buy such other organizations and plants for cash. The buying of some of the plants for cash, when it was necessary, was a part of the method of carrying out the pool or combination. The demurrer, being directed to such parts of the bill as had reference to the formation of the pool or combination, was necessarily directed to those parts which alleged the payment of cash as a method of carrying it out, as well as to those parts which alleged the taking of stock in the new corporation, as the method of securing the properties to be purchased. Hence, the answer was directed to the same part of the bill to which the demurrer was directed. Again, the answer sets up facts showing that the American Glucose Company relinquished its manufacturing business at Peoria, and transferred its property, through the deeds to Johnson, to a new corporation, organized in New Jersey to do the same business in Illinois which the American Glucose Company had theretofore done in Illinois. In other words, the answer sets up facts showing that the American Glucose Company discontinued the business for which it was created, and surrendered to another corporation its property and the conduct of such business, without alleging in any way that the American Glucose Company was insolvent, or that it was necessary for it so to transfer its business and property. The effect of such transfer was to lessen the number of corporations engaged in the business of manufacturing glucose, because the answer treats the Glucose Sugar Refining Company as an already existing corporation, engaged in the business when the transfer to it was made. If this was so, the American Glucose Company, without cause, suppressed competition in the business to the extent stated. This part of the answer, therefore, was directed to the allegations in regard ⁶⁴¹ to the formation of a trust set forth in the bill, and was, therefore, directed to the same part of the bill which was demurred to. Again, the bill was charged by the Glucose Sugar Refining Company to be demurrable upon the ground that it was filed by a stockholder; and the reason why it is urged that a stockholder cannot file a bill is, that a stockholder cannot enjoin the sale of the property of a corporation upon the ground that the purchaser intends to violate the criminal law of the state. The answer, however, proceeds to reply to the bill as though it was properly in court, and the stockholder had a right to file it. In other words, the answer concedes what the demurrer denies.

The defendant may not answer and demur also to the same

part of the bill. If he demur to a part, and answer to the same part, both cannot stand; the demurrer in such case is overruled by the answer: *Barbey's Appeal*, 119 Pa. St. 413; 6 *Ency. of Pl. & Pr.* 414. We are inclined to the opinion that the answer of the Glucose Sugar Refining Company overrules its demurrer in one or more of the respects above referred to.

But, whether this is so or not, the Glucose Sugar Refining Company was a purchaser of the property *pendente lite*. Counsel for the Glucose Sugar Refining Company claim that there was a sale of this property to it. It is doubtful, under the evidence, whether there was any sale at all. The deed by the American Glucose Company was made to Johnson, but he swears that it was never delivered to him, and that he never purchased the property. The deed by the American Glucose Company was not made to the Glucose Sugar Refining Company, but was made to Johnson, and a deed is alleged to have been made by him to the Glucose Sugar Refining Company. Johnson received no purchase money, and, when he signed the deed, was not aware of the character of the instrument he was signing. The deed made to him, and the deed made by him, were made after this bill was filed, ⁶⁴² and after summons was served upon the American Glucose Company. *Lis pendens* begins from the service of the summons or subpoena after the filing of the bill: *Grant v. Bennett*, 96 Ill. 513. "A purchaser from the defendant while the suit is pending acquires his interest subject to such decree as may be rendered on the hearing": *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233. In *Norris v. Ile*, 152 Ill. 205, 43 Am. St. Rep. 233, we said: "Where there is a purchase *pendente lite*, not only is the purchaser bound by the decree that may be made against the person from whom he derives the title, but the litigating parties are exempted from taking any notice of the title so acquired; and such purchaser need not be made a party to the suit. He is not a necessary party, because his vendor or grantor continues as the representative of his interests, and the plaintiff or complainant may ignore his purchase, and proceed to final decree against the original parties."

Here, the American Glucose Company, and the officers and directors thereof, and the majority of stockholders withdrew their answers, and submitted to a default; and a decree, confessing all the allegations of the bill, was entered against them. That decree is binding upon the Glucose Sugar Refining Company as a purchaser *pendente lite*. As a decree *pro confesso* was

entered against the American Glucose Company, finding such allegations of the bill to be true as justify the setting aside of the sale of its property, the Glucose Sugar Refining Company, which claims to derive title from the American Glucose Company, is bound by this decree against the latter company.

The decree pro confesso is sustained by the testimony in the record. Wilson, counsel for the Glucose Sugar Refining Company, was present at the taking of all the testimony on the part of the complainants below, and cross-examined the witnesses. The interests of the American Glucose Company, and its officers and directors, were one with those of the Glucose Sugar Refining Company. ⁶⁴³ According to the showing made by this record, as soon as the answers of the former were withdrawn, their counsel at once entered their appearance as solicitors of the latter.

It is true that counsel for the Glucose Sugar Refining Company refused to allow witnesses to testify upon many material and important matters. Many of these witnesses say that they declined to answer simply because Wilson objected to the questions. Two of the counsel in this case refused to answer questions when they were upon the stand as witnesses. As we understand the record, the refusal to answer was not placed upon the ground that the witnesses would thereby criminate themselves, as showing their violation of the laws of the state against trusts and combines. Their privilege in this regard was not claimed. Nor did the main counsel, when testifying, base the refusal to answer upon the ground that to do so would be to divulge privileged communications. These witnesses were forbidden to answer merely upon the alleged ground that the questions addressed to them called for immaterial testimony. This is no reason why a witness should refuse to answer, where, in the question, no self-crimination or privileged communication is involved. Therefore, the constant objections and refusals to answer which appear all through this record amount to an actual obstruction of the administration of justice. The fact of such refusal is to be considered against the defendants, the same as any other refusal to produce evidence, which is within the power of a witness. Such refusal to answer is competent evidence against the witness: *Andrews v. Frye*, 104 Mass. 234; 29 Am. & Eng. Ency. of Law, 846.

But, notwithstanding the difficulties thrown in the way of eliciting evidence by these objections and refusals to answer, the record contains sufficient testimony to set aside the transfer

made of the property of the American Glucose Company, as the same is above detailed.

⁶⁴⁴ Many points are made by counsel for Joseph Firmenich and George Firmenich in their arguments in support of their demurrer to the bill. But, in view of the disposition of the case, so far as the Firmenichs are concerned, which is hereinafter made, it is unnecessary to notice these points. Allegations of the bill which concern the Firmenichs are few and meager. Counsel for plaintiffs in error consents in his brief that the bill may be dismissed as to the Firmenichs.

So far as the Illinois Trust and Savings Bank is concerned, it claims to have no interest in the transaction, except as a repository and holder in escrow of the papers of all the parties concerned.

Therefore, we are inclined to think that whatever error the circuit court committed in sustaining the demurrer of the Firmenichs and of the bank is not sufficient to justify a reversal and remandment of the cause for the purpose of allowing them to answer the bill.

The decree of the court below, dismissing the bill, is reversed, and the cause is remanded to the circuit court of Peoria county, with instructions to dismiss the bill as to Joseph Firmenich and George Firmenich, and the Illinois Trust and Savings Bank, and to enter a decree, setting aside the deed of the American Glucose Company to Edwin L. Johnson, and the deed executed by Edwin L. Johnson to the Glucose Sugar Refining Company, and all the contracts, assignments, and other instruments, accompanying the delivery of those deeds, so far as the American Glucose Company and its directors and officers and stockholders are concerned, and to grant such other and further relief as is consistent with the prayer of the bill, and as is sustained by the evidence already in the record.

What Combinations Constitute Unlawful Trusts.*

Scope of Note.—In this note we shall be concerned primarily with the question as to what contracts or combinations form unlawful trusts. Whether there is an adequate remedy in any particular case, or what remedies are available at all, will not be treated. An agreement may be unlawful and yet third persons have no remedy. Parties to an unlawful agreement may, perhaps, complain of it themselves, stockholders in a corporation may, as in the principal case, have a right to enjoin or otherwise interfere with

* REFERENCE TO MONOGRAPHIC NOTES.

Validity of contracts in restraint of trade: 92 Am. Dec. 751-765.

the performance of an agreement which creates an unlawful trust, and in many cases the state itself may interfere to annul trust combinations. But whatever relief may be given, whether the complaining party is the state, a stockholder in a corporation, a third party, or one of the parties to the unlawful agreement, it will not be treated in this note. Much of the current discussion relative to trusts and the protection the law furnishes them is in point only so far as applied to the remedies which the law gives. The law may condemn an agreement so as to render it void and unenforceable by the courts, where such condemnation will not reach to the extent of imposing criminal liability, or even civil liability in damages to a third party. A good example of this is a contract in unreasonable restraint of trade which at common law was not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but was simply void, and was not enforced by the courts: *United States v. Addyston Pipe etc. Co.*, 85 Fed. Rep. 271. See, also, *Aetna Ins. Co. v. Commonwealth* (Ky.), 51 S. W. Rep. 624. The general doctrine relating to contracts in restraint of trade will only be touched incidentally. We shall include in the discussion all contracts and combinations, whether of capital or labor, and whether of large industries or small, which are within the principle of the modern doctrine against trusts. The word "trust," as a legal term, in the sense in which we use it, is of very recent origin. So recent, indeed, that few of the cases make any use of the term whatever. Its use is very rare outside of decisions under anti-trust laws, and yet the principle which the word embodies is very general in its application.

Definition of Trust.—The word "trust" has come to signify any combination, whether of producers or vendors of a commodity, for the purpose of controlling prices and suppressing competition. All contracts, agreements, and schemes, whereby those who are competitors combine to regulate prices are "trusts": 2 Cook on Corporations, sec. 503 a; 26 Am. & Eng. Ency. of Law, 229. In its origin, the word "trust" meant a genuine trust agreement, whereby trustees were empowered to hold the stock of several corporations, the stockholders receiving in return trust certificates. The trustees own the stock, vote it, elect the directors of the various corporations, and effectively control all the corporations in the combination. The Standard Oil trust and the sugar trust are well-known examples of the original form of trust organization. These early forms of trusts were, in reality, copartnership trusts, and since a corporation had no power to enter into a partnership agreement, they were declared to be illegal on this ground, and the charters of the various corporations composing the trust were subject to forfeiture in an action by the state. In the sugar trust case—*People v. North River Sugar etc. Co.*, 121 N. Y. 582, 18 Am. St. Rep. 843—the court said that the conduct of the corporations had "helped to create an anomalous trust, which is, in substance and effect, a partnership of twenty separate corporations.

.... It is a violation of law for corporations to enter into a partnership. The vital characteristics of the corporation are of necessity drowned in the paramount authority of the partnership. There can be no partnerships of separate and independent corporations, whether directly or indirectly through the medium of a trust." To the same effect see *State v. Standard Oil Co.*, 49 Ohio St. 137, 34 Am. St. Rep. 541; *Mallory v. Hanaur Oil Works*, 86 Tenn. 598; *Bishop v. American Preservers' Co.*, 157 Ill. 284, 48 Am. St. Rep. 317.

The original form of trust being declared illegal, the law was sought to be evaded by the formation of a large corporation, to which the property of other corporations was transferred. The principal case furnishes a good example of such an organization, which met the same fate at the hands of the law as the original form of trust agreements, though not because a partnership was formed. In *Distilling etc. Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, the question was raised directly as to whether a transfer by trustees of the property of several corporations to a single corporation did not purge the original trust combination of its illegality. It was contended that "the change in the mode of holding the distillery properties of the various corporations formerly belonging to the trust, by surrendering the stock of the corporations by means of which the control of those properties was formerly maintained, and having the properties themselves transferred and conveyed directly to the defendant corporation, had purged the combination of its illegality. It must be admitted that these changes, so far as they have any effect upon the rights or interests of the former stockholders in those corporations or of the public, are formal, rather than substantial. The same interests are controlled in substantially the same way and by the same agencies as before. The nine trustees of the trust, who, as holders of all the capital stock of the corporations and as a majority of the directors of each, controlled such corporate property, became the subscribers for all the stock of the new corporation and its board of directors. The conveyance and transfer of the properties of the constituent companies to the new corporation was merely a transfer by the trustees to themselves, though in a slightly different capacity, and the former stockholders in the constituent companies simply exchanged their trust certificates, share for share, for stock in the new corporation. That corporation thus succeeds to the trust, and its operations are to be carried on in the same way, for the same purposes, and by the same agencies, as before. The trust, then, being repugnant to public policy, and illegal, it is impossible to see why the same is not true of the corporation which succeeds to it and takes its place. The control exercised over the distillery business of the country—over production and prices—and the virtual monopoly formerly held by the trust, are in no degree changed or relaxed, but the methods and purposes of the trust are perpetrated and carried out with the same persistence and vigor as before the organization of the corporation.

There is no magic in a corporate organization which can purge the trust scheme of its illegality, and it remains as essentially opposed to the principles of sound public policy as when the trust was in existence. It was illegal before and is illegal still, and for the same reasons." The form of trusts at the present time is almost entirely that of a corporation. The original trust agreement whereby trustees held the stock of the various corporations is practically superseded by the large corporation. The determining question is not, what is the form of the trust agreement, but what is the effect. A trust in the form of a stockholding corporation is illegal, not merely because of its effect, but because a corporation cannot, as a general rule, purchase and hold stock in another corporation. This question was involved in the case of *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, where the defendant had secured a controlling interest in the gas companies operating in Chicago, and it was held that the charter of the defendant conferred no power, either expressly or by implication, to purchase stock in another corporation: See, also, *National Harrow Co. v. Bement*, 21 N. Y. App. Div. 290, where a corporation was organized to take assignments of patents for harrows, and to lease the same back to the corporations manufacturing the harrows, under a contract which fixed the price and limited the production. A trust may be formed by individuals as well as by corporations. If its effect is to suppress competition and regulate prices, the result may be a trust: See *Fairbank v. Leary*, 40 Wis. 637; *Texas etc. Oil Co. v. Adoue*, 83 Tex. 650, 29 Am. St. Rep. 690, and other cases cited later.

Real Basis of the Doctrine as to Illegal Trusts.—Some conflict is found in the decisions by reason of a confusion of the doctrine against contracts in restraint of trade and that against restrictions upon competition. The confounding of these two doctrines is to be observed as well in the recent anti-trust legislation of the various states, in which agreements in restraint of trade are condemned to an extent not intended, and unnecessary in view of the evil against which such legislation was aimed. The rules relating to contracts in restraint of trade are well settled and of long standing. Such contracts are valid if the restrictions as to time and space are reasonably necessary for the protection of the party in whose interest they were made. While agreements in general restraint of trade are frequently held void (*Lufkin Rule Co. v. Fringell*, 57 Ohio St. 596, 63 Am. St. Rep. 736; *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177), yet a restraint so broad as to cover the entire country has been held valid, where it was reasonably necessary to protect the person for whose benefit the covenant was made: *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 49 Am. St. Rep. 784; *Anchor etc. Co. v. Hawkes*, 171 Mass. 101, 68 Am. St. Rep. 403; *Nordenfelt v. Maxim Nordenfelt etc. Co.*, [1894] App. Cas. 535; *Underwood v. Barker*, [1899] 1 Ch. 300. The test as to whether a contract in restraint of trade is valid is whether the restraint is reasonably necessary to protect the party in whose favor it was made: See, also, *Trenton Potteries*!

Co. v. Olyphant (N. J.), 43 Atl. Rep. 723; *Lanzit v. Sefton Mfg. Co.*, 83 Ill. App. 168.

On the other hand, the doctrine that restrictions on competition may be illegal under certain circumstances is of comparatively recent growth, and seems not to be clearly recognized in England at all: See the article on Anti-Trust Legislation and the Doctrine against Contracts in Restraint of Trade, 33 Am. Law Rev. 63. It is this doctrine and this alone which should be applied to modern trade combinations and trusts. Very frequently a contract is reasonable so far as the mere restraint on trade is concerned, both the limit in time and in space being no greater than is necessary to protect the buyer against the seller; and yet the agreement may be illegal as imposing such a restriction upon competition as to create a virtual monopoly. If such an agreement were dealt with as imposing an illegal restriction upon competition, it could not be enforced. But if the court sees only the restraint on trade, which, under modern rules of law, is reasonable and valid, then the agreement is likely to be sustained and the trust protected. Contracts may also be entered into which, by their terms, impose no restraint on trade, but their effect may be to create a monopoly by putting an end to competition. In such a case, the doctrine against contracts in restraint of trade is powerless to affect in any manner the resulting combination. If, however, the doctrine against restraints on competition is recognized and applied, the agreement will be declared illegal, and the trust formed will find itself unable to enforce the contract it has made. The purpose of a trust is to create a monopoly, and the doctrine against restrictions on competition is aimed solely at this evil of monopoly, and it is because this rule of law condemning restrictions on competition is violated that trusts and trade combinations of any sort are illegal.

This doctrine against restrictions on competition created merely by the acts of the parties is of recent growth. In fact, the early tendency seemed to be to condemn unrestricted competition as an evil: See *Whitney v. Slayton*, 40 Me. 224. In *Kellogg v. Larkin*, 3 Pinney, 123, 56 Am. Dec. 164, it was urged that a contract was unlawful because it tended to depress the wheat market and to stifle the fair and lawful competition therein. In answer to this objection the court said: "I admit that it does tend to stifle the competition of these obligors, and I assert that the right to stifle competition by contract, so far as it is injurious to the parties contracting has not been denied or questioned for two hundred years, unless two cases reported in 4 Denio, 349, 47 Am. Dec. 258, and 5 Denio, 434, 49 Am. Dec. 282, are to be considered as denying the right." In *Chappel v. Brockway*, 21 Wend. 157, the plaintiff and defendant seem to have been the only competitors in running packet boats on the Erie canal between Rochester and Buffalo, and the defendant sold out to the plaintiff, contracting not to enter the business again at any time within those limits. The court applied the usual doctrine relative to contracts in restraint of trade and sustained the agree-

ment. In replying to the objection that the agreement created a monopoly, the court said: "As to the charge of combination and confederacy, having for its object a monopoly, the whole amounts to little more than a string of words which are in bad repute, because they most commonly stand connected with bad acts. . . . It does not necessarily follow that the public was injured, because the price for carrying was raised. The traveler has other interests at stake besides that which immediately touches his pocket, and there may be such a thing as riding at too cheap a rate. Competition in business, though generally beneficial to the public, may be carried to such an excess as to become an evil." In *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102, the plaintiff and defendant were running competing stages between Boston and Providence, and the defendant, sold out to the plaintiff, contracting not to run a stage on a certain road. The court sustained the agreement, and said that "the public appear to have no interest in this question," although a monopoly of that stage route seems to have been effected: See, also, *Palmer v. Stebbins*, 3 Pick. 188, 15 Am. Dec. 204.

While the early cases fail to recognize the difference between the two doctrines, and seem not to condemn restrictions upon competition, the doctrine against monopolies created by the act of private parties is at the present time well established, though its application is frequently overlooked. "The utter inadequacy of the doctrine condemning contracts in restraint of trade, as a basis to which to refer that against restrictions upon competition, seems to us to be made clear by illustration. At least, until very recently, the doctrine against contracts in restraint of trade would have been so applied as to hold illegal the withdrawal (without limit as to time or space) of one out of a thousand trade competitors in a given city, notwithstanding that the continuance of the other nine hundred and ninety-nine would have effectually prevented the danger of a monopoly. On the other hand, the same doctrine would (as modified as to space) have been ordinarily so applied as to hold legal the withdrawal by agreement of the nine hundred and ninety-nine, though such withdrawal would seem to be ordinarily within the condemnation of the present doctrine against restriction upon competition": 33 Am. Law Rev. 68.

To form an illegal trust it is not necessary that a pure monopoly be effected. The test is whether the contract or combination in its apparent purpose and natural consequence places such a restriction upon competition as tends to create a monopoly: *Addyston Pipe etc. Co. v. United States*, 175 U. S. 211; *Texas etc. Oil Co. v. Adoue*, 83 Tex. 650, 29 Am. St. Rep. 690. In this last case it was said that "the agreement may be illegal if the natural or necessary consequences of its operation are to prevent competition and create fictitious prices, independent of the law of demand and supply, and to such an extent as to injuriously affect the interests of the public, or the interests of any particular class of citizens who may be especially interested, either as producers or consumers, in the arti-

cles or staples which are the subject of the restrictions imposed by the contract." It is not the mere sale of the right to compete in a particular business or calling which is invalid, for such an agreement may be entered into if the rights of the public cannot be affected: *Cowan v. Fairbrother*, 118 N. C. 406, 54 Am. St. Rep. 733. It is the tendency to create a monopoly that renders the agreement void, and makes an illegal trust out of a combination: *Fishburn v. Chicago*, 171 Ill. 338, 63 Am. St. Rep. 236. The mere consolidation of firms for the purpose of reducing competition between them is not in itself illegal: *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 49 Am. St. Rep. 784; *Cohen v. Berlin etc. Envelope Co.*, 56 N. Y. Supp. 588. But this rule should not be carried to such an extent as to require the courts to assume to say how much competition is desirable, as has been attempted in some cases. This was the case in *Leslie v. Lorillard*, 110 N. Y. 519, where a combination between competing steamship lines, entered into for the purpose of restraining competition, and which apparently resulted in a complete monopoly of the business, was sustained, the court saying that "competition is not invariably a public benefaction; for it may be carried on to such a degree as to become a general evil." To permit courts to pass upon the question of how much competition is desirable, and to determine the legality or illegality of a trust upon the sole consideration as to whether, in the opinion of a few men, unrestrained competition between the parties to the agreement is desirable or not, furnishes not only an uncertain standard and a vague rule, but gives to the courts a dangerous power. It was pointed out in *United States v. Addyston Pipe etc. Co.*, 85 Fed. Rep. 271, that "the manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it."

The only safe rule is that which we have already stated, viz., whether the purpose and natural consequence of the agreement tends to create a monopoly. The case of *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549, seems open to criticism upon the ground that the court failed to grasp the real basis of the objection against the combination. The restraint upon trade was confined, to be sure, to the city of San Diego, and as a mere restraint upon trade was undoubtedly valid. But the restriction upon competition seems to have been complete, and a monopoly in the water supply of San Diego was effected. If the court had distinguished clearly these two doctrines, the result might have been different, unless the mere fact that unreasonable water rates could, under the California law, never be charged is sufficient to take the case out of the rule against restrictions on competition.

Combinations and Contracts Among Manufacturers.—The cases are numerous where manufacturers have combined to form illegal trusts. The courts have striven to protect the liberty of the individual and of corporations to contract, and at the same time to protect

the public against an abuse of such right. A contract merely to abandon one's business and enter the permanent employment of another in the same line of business is not in restraint of trade, nor against public policy: *Carnig v. Carr*, 167 Mass. 544, 57 Am. St. Rep. 488. Generally speaking, a contract with a manufacturer to purchase his entire product is harmless, though it does, naturally, restrain the producer from selling to others: *Carter-Crume Co. v. Peurrung*, 86 Fed. Rep. 439. And the mere fact that a manufacturer enlarges his business by purchasing other plants of the same character as his own, is not in itself illegal as creating a trust: *Coquard v. National etc. Co.*, 171 Ill. 480. It was laid down in an early case that the nature of the business and the adequacy of the supply furnished the public by other dealers are important considerations in determining the legality of the contract: *Duffy v. Shockey*, 11 Ind. 70, 71 Am. Dec. 348. As already pointed out, mere contracts by a seller not to engage in the business elsewhere so as to compete with the buyer must not be confused with contracts whose purpose and necessary tendency are to create a monopoly: See *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464.

Occasionally, there is a difficulty in determining whether the legitimate limits of the right to contract have been passed. This is especially true where the only intent to establish a monopoly exists in the mind of the buyer, and the seller is simply selling out and nothing more, an act which he has an unquestioned right to do. For example, suppose there are five manufacturing plants in a single industry. The owner of one of them starts out as a buyer to purchase the other plants so as to establish a monopoly in the industry. He has a right to purchase, and the owners of the other plants have an equal right to sell. It is clear that if the purchase of the four plants is but one scheme to form a single combination, known to all the parties, and entered into for that purpose by them, the contract is illegal as establishing a monopoly, and the combination formed is a trust, and the agreement cannot be enforced. But if the purchase of each plant is a separate arrangement, unknown to any of the others, entered into honestly and in good faith by the vendors, the question is more difficult. The cases where large trusts are formed in this latter way are, perhaps, few and can seldom arise, and still they have arisen, and their effect is to create a virtual monopoly. Yet, so far as the several contracts are concerned, their validity cannot be attacked on the ground that their effect, taken together, will result in the formation of a monopoly. This question arose in *Carter-Crume Co. v. Peurrung*, 86 Fed. Rep. 439, where the plaintiff entered into independent contracts with several manufacturers of wooden butter dishes. The purpose of the plaintiff was to monopolize the trade; but this was unknown to the other manufacturers, each of whom was unaware of the existence of any contract other than his own, and none of whom participated in any manner in the unlawful purpose of the plaintiff. In sustaining the validity of one of these separate contracts, the court said: "That

of itself was not a contract in general restraint of trade. If one contracts with a manufacturer for his entire product, it will, of course, restrain the producer from selling to others. But such a contract, taken by itself, is ordinarily harmless. The public are not affected. Another question might arise if all or a large proportion of all the producers of a particular article should agree to sell their entire product to one buyer, who would thereby be enabled to monopolize the market. But, if each independent producer contracts to sell his product, or to sell or lease his plant, without concert with others, or knowledge of or purpose to participate in the plans of the buyer, he cannot be said to have conspired against freedom of commerce, or to have made a contract in illegal restraint of trade. The transaction with Peurrung Brothers & Co. was, on its face, legitimate, and it cannot be impeached simply by evidence that the Carter-Crume Company understood and intended it as one step in a general illegal scheme for monopolizing the trade in wooden butter dishes, and controlling prices." The case of *Trenton Potteries Co. v. Olyphant* (N. J.), 43 Atl. Rep. 723, if in harmony with American authority, must be sustained on this ground, if at all. The case, as first reported in 56 N. J. Eq. 680, is more in line with the general trend of court decisions relative to trade combinations and trusts, and seems to be the better decision. See, also, *Clancey v. Onondaga etc. Co.*, 62 Barb. 395, where it was held that to make the contract void, the illegal purpose must be known to both parties. In transactions of the character shown by the principal case, where the several sales enter into and form one general scheme, the purpose of which is to form a monopoly, the illegality of the resulting combination cannot be questioned. The purpose to form a monopoly will generally appear either in the contract itself or in the negotiations that led to its formation. This appears in the case of *Richardson v. Buhl*, 77 Mich. 632, wherein was involved the validity of the combination known as the Diamond Match Company. To secure a monopoly of the match trade was the open and boldly avowed purpose of the combination. That contracts and combinations to that end are void as against public policy was very forcibly stated by the court: "Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise, or public work under government control, in the interest of the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the federal constitution, and is not allowed to exist under express provision in several of our state constitutions. Indeed, it is doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interest of the public and that of the people, for the personal gain and aggrandizement of a few individuals. It is always destructive

of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment, against it. All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessities of life, are monopolies, and intolerable, and ought to receive the condemnation of all courts."

This strong language is approved very generally by the courts, and it may be said that all combinations of like character whose purpose and necessary tendency are to so restrict competition as to form a monopoly are illegal trusts. In *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, a voluntary association of salt manufacturers for the purpose of fixing the price of salt, was held to be void as establishing a monopoly and destroying competition in trade: See, also, *Clancey v. Onondago Salt Mfg. Co.*, 62 Barb 395. An agreement under which an association is formed, for the purpose of increasing the price and decreasing the manufacture of candles within a certain territory, was held void in *Emery v. Ohio Candle Co.*, 47 Ohio St. 320, 21 Am. St. Rep. 819. An association of manufacturers of wire cloth, formed for the purpose of regulating the price of the commodity, each of the members stipulating, under a heavy penalty, that he will not sell at less than a specified rate, is illegal: *De Witt Wire-cloth Co. v. New Jersey etc. Co.*, 14 N. Y. Supp. 277. An agreement entered into by corporations engaged in furnishing gas to a city, fixing the price of gas to be charged consumers, and stipulating that neither company in the combination would furnish gas to persons who were consumers of the other company, is unlawful, and furnishes a basis for a monopoly: *State v. Portland etc. Co.*, 153 Ind. 483, post, p. 314. In this case the court said: "It is an old and familiar maxim that 'competition is the life of trade,' and whatever act destroys competition, or even relaxes it, upon the part of those who sustain relations to the public, is regarded by the law as injurious to public interests, and is therefore deemed to be unlawful, on the grounds of public policy. The authorities affirm, as a general rule, that, if the act complained of, by its results, will restrict or stifle competition, the law will regard such act as incompatible with public policy, without any proof of evil intent on the part of the actor or actual injury to the public. The inquiry is not as to the degree of injury inflicted upon the public; it is sufficient to know that the inevitable tendency of the act is injurious to the public." *Chicago Gas etc. Co. v. People's Gas. etc. Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, was a similar case, decided in the same way. The court, however, seemed to lay special stress on the fact that the corporations were quasi public in character and owed special duties to the public which they could not abandon. While this is

true, it is not essential that the corporation should be quasi public in order to render a combination into which it enters an illegal trust. The injury to the public is undoubtedly greater, but the duty which a quasi public corporation owes to the public simply gives added force and point to the underlying reason, viz., that the agreement is for the purpose of restricting competition and of creating a monopoly. The same court went further in *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, and held that if the charter itself of the corporation contained a provision, the necessary effect of which was to create a monopoly, it was void as against public policy: See, further, *San Antonio Gas Co. v. State* (Tex.), 54 S. W. Rep. 289. *Rafferty v. Buffalo City Gas Co.*, 37 N. Y. App. Div. 618, seems opposed to the decisions above cited. This is due, apparently, to the existence in New York of the doctrine that the courts have the power to determine how much competition is desirable, and, seemingly, competition which is so extreme as to be ruinous is undesirable, and any combination formed to prevent such ruinous competition is proper, and is not invalid by reason of creating a monopoly. We have already pointed out that such a rule is uncertain and likely to prove dangerous. Practically, all competition to-day between large corporations partakes more of the nature of warfare than of ordinary competition. Its purpose is to kill the other party so as to destroy competition; its aim is in no sense to regulate prices. If the New York rule is to prevail in that state there would seem to be no effective check upon combination. A preliminary competition of the cut-throat variety could be instituted, and the smaller organizations, to escape impending ruin, could combine with the successful highway competitor. The resulting trust would not be illegal, because, forsooth, its purpose is to prevent ruinous competition, which it does most effectually by stifling competition completely and creating a pure monopoly. The only test, as we have said before, is to ascertain whether the apparent purpose and necessary result of the combination are to so restrict competition as to create a virtual monopoly; if it does this, then an illegal trust is created.

Massachusetts seems also to have gone astray on the question of illegal combination, but on a different ground, having confused the doctrine relating to contracts in restraint of trade and the doctrine against restrictions upon competition. In *Anchor etc. Co. v. Hawkes*, 171 Mass. 101, 68 Am. St. Rep. 403, several electric corporations combined to form one large corporation, which is the usual method of organizing a trust. Apparently, the only purpose was to combine to prevent competition, although it does not clearly appear whether a monopoly was created or not. The court, in holding the combination and the contract entered into valid, discussed the question solely from the standpoint as to whether the restraint upon trade imposed by the contract was reasonably necessary to protect the party in whose favor it was made, entirely ignoring the question whether the combination was promotive of a monopoly or not, which was the crucial one, if the parties to the agreement were the

only ones engaged in the electrical manufacturing business in that part of the country. The same criticism can be more justly made of Gloucester etc. Glue Co. v. Russia Cement Co., 154 Mass. 92, 26 Am. St. Rep. 214, and Central Shade Roller Co. v. Cushman, 143 Mass 353, though in these cases the opinion of the court that the articles manufactured, glue and roller shades, were not necessities of life was of considerable, if not controlling, importance. This question of the character of the article, as affecting the legality of the combination, will be discussed later.

A combination of beer manufacturers to control the manufacture and sale of all distillery products is illegal and void, because it tends to destroy competition and to create a monopoly: Distilling etc. Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200; State v. Nebraska Distilling Co., 29 Neb. 700. In Texas, it is held that such an agreement is void under the anti-trust law, though probably not at common law: Anheuser-Busch Brew. Assn. v. Houck (Tex. Civ. App.), 27 S. W. Rep. 692. An association of brick manufacturers for the purpose of controlling the price of brick in the interest of its members is against public policy and illegal: Jackson v. Brick Assn., 53 Ohio St. 303, 53 Am. St. Rep. 637. An agreement designed to form a trust for the purpose of "securing co-operation in the business of manufacturing preserves, and of selling and dealing in the same in home and foreign markets," which welds together all the interests engaged in the business into one immense combination, is illegal: Bishop v. American Preservers' Co., 157 Ill. 284, 48 Am. St. Rep. 317. "This co-operation," said the court, "to be secured through the extraordinary powers conferred upon the nine trustees named in the agreement, six of whom are designated by name and authorized to elect three others, could not result otherwise than in a grinding monopoly, controlling all trade in the business specified, and raising or depressing prices therein at the will of the trustees."

A combination of iron pipe manufacturers in different states to divide the territory among one another, the reserved territory to be free of competition from the others, though a provision was made for pretended bids at prices previously arranged, is illegal at common law and under the federal anti-trust law. A combination may illegally restrain trade by preventing competition for contracts and enhancing prices, although it does not prevent the letting of any particular contract: United States v. Addyston Pipe etc. Co., 85 Fed. Rep. 271; affirmed in 175 U. S. 211. Judge Taft, in the circuit court of appeals, lays down a very satisfactory test for determining the legality of contracts in restraint of trade, which is that, a restraint, to be legal, must be merely ancillary to some lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. But where the sole object of the contract is to restrain competition, the contract is void. In discussing this principle the court said: "The very statement of

the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: 1. Because it oppresses the covenantor, without any corresponding benefit to the covenantee; and 2. Because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case, there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster." This doctrine, we believe, would prove sufficient to deal with most cases of contracts restricting competition and which form unlawful trusts, with this extension of the rule, which the cases seem to warrant, viz., that even though there be an apparent main lawful contract, yet if its obvious purpose and necessary result are to establish a monopoly, the contract is void. The rule as stated by Judge Taft seems capable of this extension. The line is often vague between lawful and unlawful contracts in restraint of trade, but an application of this rule will serve to render it more distinct: See *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596, 63 Am. St. Rep. 736, where the line is close but seems to have been correctly drawn.

In *Santa Clara etc. Lumber Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, it was held that a contract entered into between lumber manufacturers, whereby one of them agreed to make and deliver, during a certain year, a certain quantity of lumber, and not to manufacture any lumber to be sold to any other person within four counties named, and to pay a certain penalty for any lumber manufactured and sold to any other person, is in restraint of trade and void, where it appears that the contract was entered into for the purpose of limiting the supply of lumber, and increasing the price thereof, and giving one of the contracting parties the control of all lumber manufactured near a particular town in the year designated, and to control the supply of lumber for that year in the counties mentioned in the contract. This is a good example of a case in

which the rule laid down in *United States v. Addyston Pipe etc. Co.*, 85 Fed. Rep. 271, was correctly applied. The same principle is applicable to *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Am. St. Rep. 242, where a combination between powder manufacturers, dividing a large territory between them, the quantity to be sold being regulated, and the price to be charged being fixed by a committee, was held illegal. In *John D. Park & Sons Co. v. National etc. Assn.*, 50 N. Y. Supp. 1064, a combination between manufacturing and wholesale druggists to prevent the customers of one of them from obtaining goods from the others because they violate an agreement with one in respect to cutting prices, and to make such violation a cause of general exclusion from the power to purchase any kind of proprietary medicines from any of the combination, is illegal.

Various forms of contracts have been devised in order to evade the laws in condemnation of combinations which tend to a monopoly, and at the same time be able to reap all the advantages which pertain to a monopoly. In *National Harrow Co. v. Bement*, 21 N. Y. App. Div. 290, a combination was formed, and the contract entered into provided for a certain price, above which goods could not be sold, but the price could be decreased. The fixed price was some forty per cent above the real value and selling price of the harrows. The contention was that the contract having established a fixed maximum price, above which the harrows could not be sold, was not one to raise prices, and in fact could not raise prices, above those established, and hence was not against public policy and illegal. To this the court replied: "A contract fixing the prices of harrows at more than forty per cent above their value or selling prices, and authorizing the licensor to reduce, but not to increase, the prices, as effectually controls the prices for all practical purposes as though the power to increase had been expressly reserved to the plaintiff. It would hardly be practicable to fix the prices at more than forty-three or forty-five per cent above the selling prices of the harrows." In *American etc. Co. v. Peoria etc. Co.*, 65 Ill. App. 502, a device was made under the form of a lease, whereby one manufacturer was paid as rent a bonus, the purpose being to keep his plant idle, and thus limit production and maintain prices. The combination formed was held to be an illegal trust under the Illinois statute. Without the statute, however, its illegal character would have been recognized. A contract somewhat similar was held illegal in *Fox etc. Steel Co. v. Schoen*, 77 Fed. Rep. 29, where one manufacturer, without any sale to another, was prohibited from manufacturing pressed metal parts. But in *United States Chem. Co. v. Provident Chem. Co.*, 64 Fed. Rep. 946, a lease by one manufacturer of his plant to another for the purpose on the part of the lessee of removing the competition of the lessor, was held valid, the lease being made in good faith and not being effectual to create a monopoly.

For further discussion of illegal trust combinations, see *Merz*

Capsule Co. v. United States Capsule Co., 67 Fed. Rep. 414, holding the combination of manufacturers of gelatine capsules illegal; **Cravens v. Carter-Crume Co.**, 92 Fed. Rep. 479, declaring illegal a combination of wooden ware manufacturers; **Lufkin Rule Co. v. Fringeli**, 57 Ohio St. 596, 63 Am. St. Rep. 736, where a sale by one manufacturer of rules to another was condemned because it tended to form a monopoly. It may be doubted whether this case would be followed in many jurisdictions, for it seems to have been a bona fide sale and not a mere combination of manufacturers of the same article of trade. Attention has already been called to the illegality of the sugar trust, which was also held illegal because it created a monopoly: **People v. North River Sugar etc. Co.**, 121 N. Y. 582, 18 Am. St. Rep. 843; and of the Standard Oil trust: **State v. Standard Oil Co.**, 49 Ohio St. 137, 34 Am. St. Rep. 541.

Combinations Among Carriers.—It was early recognized that, as applied to carriers, a combination for the purpose of destroying competition and establishing uniform rates was injurious to trade and commerce, and hence illegal under a statute which makes it a crime to conspire to commit an act injurious to trade or commerce: **Hooker v. Vandewater**, 4 Denio, 349, 47 Am. Dec. 258; **Stanton v. Allen**, 5 Denio, 434, 49 Am. Dec. 282. While in these cases there was a violation of a statute which rendered the contract illegal, yet in the first case the court uses this general language: "It is a general proposition that an agreement to do an unlawful act cannot be supported at law, that no right of action can spring out of an illegal contract, and this rule applies not only when the contract is expressly illegal but whenever it is opposed to public policy, or founded on an immoral consideration." This was quoted with approval in **Texas etc. Ry. Co. v. Southern Pac. Ry. Co.**, 41 La. Ann. 970, 17 Am. St. Rep. 445, where the court was considering an agreement between two competing railroads between given points to divide equally between them their earnings from competitive tariff between such points. The court, in holding the agreement illegal as against public policy, said: "It is therefore too clear for further argument or illustration that the first, the lasting, and the inevitable result of the agreement to the public was to stifle competition, and, as competition is the life of trade, the effect of the contract must necessarily and inevitably have been injurious to public interests, and hence it was contrary to public policy. . . . American jurisprudence has firmly settled the doctrine that all contracts which have a palpable tendency to stifle competition, either in the market value of commodities, or in the carriage or transportation of such commodities, are contrary to public policy, and therefore incapable of conferring upon the parties thereto any rights which a court of justice can recognize or enforce." The court very properly saw no difference between a combination among railroads to stifle competition and maintain rates, and a combination among manufacturers to restrict competition and maintain prices. In **Anderson v. Jett**, 89 Ky. 375, the court, in pronouncing a combination between two

competitive steamboat lines illegal, said: "Rivalry is the life of trade. The thrift and welfare of the people depend upon it. Monopoly is opposed to it all along the line. The accumulation of wealth out of the brow sweat of honest toilers by means of combinations is opposed to competing trade and enterprise. That public policy that encourages fair dealing, honest thrift, and enterprise among all the citizens of the commonwealth, and is opposed to monopolies and combinations because unfriendly to such fair dealing, thrift, and enterprise, declares all combinations whose object is to destroy or impede free competition between the several lines of business engaged in utterly void. The combination or agreement, whether or not in the particular instance it has the desired effect, is void. The vice is in the combination or agreement. The practical evil effect of the combination only demonstrates its character; but if its object is to prevent or impede free and fair competition in trade, and may, in fact, have that tendency, it is void as being against public policy." This strong and clear language indicates that there was no question about the law condemning all combinations and contracts among railroads or other carriers which tend to stifle competition. This much can be said with safety, that where the combination establishes unreasonable rates, or rates are fixed regardless of whether they are reasonable or not, the combination is contrary to public policy and void. See, in addition to former cases, *Chicago etc. Ry. Co. v. Wabash etc. Ry. Co.*, 61 Fed. Rep. 993. Two situations have arisen, however, in which it has been held that the combinations resulting may be legal. One is where the combination establishes reasonable rates, the other where the agreement is made for the purpose of checking ruinous competition. As to these points it cannot be said that there is any thoroughly established doctrine, except, perhaps, in one or two states, and where statute has made the matter clear. The Indiana supreme court refused to pass upon the question in *Cleveland etc. Ry. Co. v. Closser*, 126 Ind. 348, 22 Am. St. Rep. 593, but said that all combinations between common carriers to prevent competition are *prima facie* illegal. In this connection the court said: "We are not, at this point, dealing with a case where a combination is formed for the purpose of preventing ruinous competition, and in which there is no design to stifle fair competition. We are not required to decide, nor do we decide, that combinations fair to the public, untainted by any sinister design, and formed solely to prevent the destruction of business by unregulated competition, may not be valid. There are, we know, cases sanctioning the doctrine that combinations may be formed where the purpose is lawful, and the means employed not forbidden by positive law or high considerations of public policy. The doctrine of these cases we neither affirm nor deny; we do, however, declare they are not relevant to the matter here in dispute. It is, however, both appropriate and necessary to adjudge that a combination between common carriers to prevent competition is, at least, *prima facie* illegal. The doubt is as to whether any ultimate purpose can

save it from the condemnation of the law; there can be no doubt that, unexplained, such a combination for such a purpose is condemned by public policy. If such a combination can, in any event, be admitted to be legal, it can only be so where it is affirmatively shown that its object was to prevent ruinous competition, and that it does not establish unreasonable rates, unjust discrimination, or oppressive regulations. If such a contract can stand, it must be upon an affirmative showing, and one so full, complete, and clear, as to remove the presumption, to which its existence, in itself, gives rise, that it was formed to do mischief to the public by repressing fair competition. The burden is on the carrier to remove the presumption, and until it is removed the agreement providing for the combination gives way before this presumption, and the agreement must be held to be within the condemnation directed against all contracts which violate public policy." The question was not approached with the same feeling of doubt by the court in *Manchester etc. R. R. v. Concord R. R.*, 66 N. H. 100, 49 Am. St. Rep. 582, where it was held that a combination between competing railroads to prevent competition was not illegal if it did not raise rates above a reasonable standard. "While, without doubt," said the court, "contracts which have a direct tendency to prevent a healthy competition are detrimental to the public and consequently against public policy, it is equally free from doubt that when such contracts prevent an unhealthy competition and yet furnish the public with adequate facilities at fixed and reasonable rates, they are beneficial and in accord with sound principles of public policy. For the lessons of experience, as well as the deductions of reason, amply demonstrate that the public interest is not subserved by competition which reduces the rate of transportation below the standard of fair compensation; and the theory which formerly obtained, that the public is benefited by unrestricted competition between railroads, has been so emphatically disproved by the results which have generally followed its adoption in practice that the hope of any permanent relief from excessive rates through the competition of a parallel or rival road may, as a rule, be justly characterized as illusory and fallacious." The argument in favor of combinations among carriers, then, is twofold: 1. If the rates established by the agreement are reasonable, the public is not injured, and hence public policy is not violated; 2. If the combination is to prevent ruinous competition and "wars" among carriers, railroads, at least, should be subject to a different rule from ordinary business enterprises, since competition among them is so severe that its inevitable result is ruin unless combination is resorted to. In answer to the first argument, it may be said that if the tendency of the agreement is to injure the public, the extent of actual injury is immaterial. The tendency of a combination is always to maintain prices, never to reduce them. A rate reasonable when the agreement is made may be rendered unreasonable merely by lapse of time and change of condition, and yet the rate will remain the same so long

as the agreement is lived up to. It is no answer to say that it is unlawful to maintain an unreasonable rate, and, if the combination rate subsequently becomes such, it is unlawful, and proceedings may be commenced to lower it; and for the reason that it might be very difficult to establish what is a reasonable rate, and, if this were established, the public would in the meantime have been greatly damaged, and solely by reason of the combination. The combination, therefore, has an inevitable tendency to injure the public, whether this is its immediate effect or not. This first argument was answered in *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, in this way: "The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition, the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable, while, in the case of an agreement to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it." This same case points out the difficulty of ascertaining whether a rate is reasonable or not, if railroad combinations are illegal only when they establish unreasonable rates. The difficulty and uncertainty in ascertaining such a fact is a strong argument against the adoption of this first argument as a rule of law.

The dissenting opinion of Judge Shiras, quoted approvingly in *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, furnishes a good answer to the second argument. "I fail to perceive," he says, "the force of the argument that, because railway companies through their own action cause evils to themselves and the public by sudden changes or reductions in tariff rates, they must be permitted to deprive the community of the benefit of competition in securing reasonable rates for the transportation of the products of the country. Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition in the matter of railroad charges may be productive of evils does not militate against the fact that such is the law now governing the subject. No law can be enacted nor system be devised for the control of human affairs that in its enforcement does not produce some evil

results, no matter how beneficial its general purpose may be. There are benefits and there are evils which result from the operation of the law of free competition between railway companies. The time may come when the companies will be relieved from the operation of this law, but they cannot, by combination and agreements among themselves, bring about this change."

Again, we have already pointed out the uncertainty of, and the danger in, the rule that allows a court to say how much competition is desirable. This rule seems to prevail in New York and, so far as railroads are concerned, in New Hampshire. In *Ives v. Smith*, 3 N. Y. Supp. 645, the rule was applied to a contract between two railroads whose lines were parallel, by which certain naturally tributary territory was preserved to each, within which it should prosecute the work of extending branch lines without interference from the other, and it was held that the agreement was not contrary to public policy, since it was designed to prevent an unprofitable war of construction. To show that the public was benefited, rather than injured, the court said: "Instead of engaging in a strife which may cripple both corporations, and obstruct the development of all the country through which the lines are to pass, they agree that each shall open up for the public certain parts of the country through which their lines are authorized to be built; that each shall pursue a plan, harmonious and consistent with its own system, affording to the public means of communication and travel, the one north, and the other south, of a certain line; that each may go on developing its enterprise, and providing for the public, within certain prescribed territory, without the constant necessity of anticipating or avoiding the effects of the action of the other. How does this course infringe a sound dictate of public policy? It rather tends to promote than to defeat the opening of new districts to travel and commerce. It does not deprive the public of an advantage, but tends to secure it by leaving each company to the work of development in a certain district, without the necessity of confining itself to counteracting or countervailing the efforts of one to occupy a certain locality to the exclusion of the other." This agreement seems to have been entered into, not for the purpose of putting an end to ruinous competition, but to prevent the commencement of any competition at all. There seems no doubt that in the territory assigned to it each road enjoyed a complete monopoly of all the trade therein, and a monopoly born and fostered solely by the agreement. It is no sufficient answer to say that the public were not injured when the agreement was made, for the time might come soon when the interests of the public would require that one road should enter the territory of the other, but if a valid agreement barred the way this could not be done. The case of *South Chicago etc. Ry. Co. v. Calumet etc. Ry. Co.*, 171 Ill. 391, seems to be an answer to this New York case. Here two street railways entered into an agreement, the effect of which was not to invade each other's territory. It was claimed that since at

the time of the agreement neither owed any duty to the public to enter the territory of the other and extend its lines therein, the agreement was valid. But the court said that the contract was, "in effect, an agreement that neither company shall invade the territory occupied by the other, even though both the interest of the corporation and the public convenience might require it to be done. Whatever tends to prevent competition among such companies and create a monopoly in their hands is against public policy. . . . The interest of these companies and the interest of the public to have the street-car lines extended as the demand therefor should arise are the same. One or both of the companies would, in its own interest, furnish such additional facility for travel as the public necessity required. . . . Any contract which tended to deprive the public of that benefit is clearly violative of public right, against public policy and void. The principle is, that such corporations shall not bind themselves by contract not to serve the public interest as the demand arises. To say the defendant was not bound to extend its lines, though it might be necessary to do so to serve the public convenience, is one thing, but to say that it shall not do so because of the binding force of its contract with an individual or corporation is quite another and very different thing."

Most of the cases considered have arisen under statutes, and for this reason are not as useful guides as they might otherwise be. The federal cases arose under the anti-trust law of 1890, and, so far as that statute is concerned, the decisions are correct interpretations of it: See, further, *United States v. Joint Traffic Assn.*, 171 U. S. 505. The common-law rule cannot be said to have been very definitely determined, except in a few jurisdictions. We submit that, generally speaking, railroads should occupy no more favored position than other corporations. The argument that the capital is large, that the plant can be used in no other way, and that it is difficult to withdraw and enter new pursuits, may be equally true of other large modern industries. If the purpose of a combination is to stifle competition, maintain rates, and establish a monopoly, the law should condemn it as an illegal trust, whether there exists a statute pronouncing it such or not. In *Central R. R. Co. v. Collins*, 40 Ga. 582, a contract by one railroad to secure a controlling interest in a competing road was held to be against public policy and illegal, the court saying: "There is no public policy more striking than that which, whilst it fosters such [railroad] undertaking, is yet careful ever to keep in view the danger of a monopoly, and the good effect of rivalry and conflict between different companies."

Contracts between a railroad company and a telegraph company, vesting in the latter the exclusive right to use or occupy the right of way of the former, for the erection of telegraph poles and other purposes in connection with its business of transmitting messages by telegraph, are void as tending to create monopolies and against

public policy: *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160, 38 Am. Rep. 781; *Union Trust Co. v. Atchison etc. R. R. Co.*, 8 N. Mex. 327; *Western Union Tel. Co. v. Burlington etc. Ry. Co.*, 11 Fed. Rep. 1; *Baltimore etc. Tel. Co. v. Western Union Tel. Co.*, 24 Fed. Rep. 319. As to what extent such a contract may be valid, see *Western Union Tel. Co. v. Chicago etc. R. R. Co.*, 86 Ill. 246, 29 Am. Rep. 28.

Combinations and Contracts Between Dealers.—The same principles are as applicable to dealers in commodities generally as to manufacturers. The character of the business is usually immaterial, the vital question being what is the character of the agreement formed. And if the agreement is for the purpose of restricting competition so as to form a monopoly and maintain prices, the agreement creates an illegal trust, which the law will not sanction and whose contracts will not be enforced. It has long been the rule that a combination among coal dealers to stifle competition and to maintain prices was illegal. In *Arnot v. Pittston etc. Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190, where it was held that combinations among the dealers of any necessary of life for the purpose of preventing competition and to maintain prices were illegal, it was said: "Every producer or vendor of coal or other commodity has the right to use all legitimate efforts to obtain the best price for the article in which he deals. But when he endeavors to artificially enhance prices by suppressing or keeping out of the market the products of others, and to accomplish that purpose by means of contracts binding them to withhold their supply, such arrangements are even more mischievous than combinations not to sell under an agreed price. Combinations of that character have been held to be against public policy and illegal. If they should be sustained, the prices of articles of pure necessity, such as coal, flour, and other indispensable commodities, might be artificially raised to a ruinous extent far exceeding any naturally resulting from the proportion between supply and demand. No illustration of the mischief of such contracts is, perhaps, more apt than a monopoly of anthracite coal, the region of the production of which is known to be limited. Parties entering into contracts of this description must depend upon each other for their execution, and cannot derive any assistance from the courts": See to the same effect, *Drake v. Siebold*, 81 Hun, 178; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159; *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501. A combination among ice dealers to prevent competition and maintain prices, was condemned as illegal in *Griffin v. Piper*, 55 Ill. App. 213. In *India Bagging Assn. v. Kock*, 14 La. Ann. 164, an agreement between commercial firms for three months not to sell any India cotton bagging, except with the consent of a majority of them, was adjudged illegal, since it was a combination to enhance the price of an article of necessity. In *Chapin v. Brown*, 83 Iowa, 156, 32 Am. St. Rep. 297, an agreement was entered into by all the grocers of a certain town by which they agreed in favor of a third person

and without consideration to quit the business of buying and selling butter for two years, and such third person agreed to carry on that business exclusively, and it was held that the agreement was against public policy as destroying competition and creating a monopoly. The decision should have been the same if there had been an adequate consideration for the promise, since the sole purpose and tendency of the agreement were to create a monopoly, which would of itself have condemned the contract as illegal and incapable of enforcement. The rule condemning combinations that create monopolies is so effective that it appears to be practically impossible for all the milk dealers of a certain locality to form an association or corporation for the purpose of controlling the supply and the price of milk: *People v. Milk Exchange*, 145 N. Y. 267, 45 Am. St. Rep. 609; *Ford v. Chicago Milk Shippers' Assn.*, 155 Ill. 166.

In *Craft v. McConoughy*, 79 Ill. 346, 12 Am. Rep. 171, a contract was declared illegal as against public policy, which was entered into by grain dealers of a town, apparently for the purpose of forming a partnership for dealing in grain, but the true object of which was to form a secret combination, which would stifle all competition, and enable the parties to control the price of grain, cost of storage, and expense of shipment at such town. The court applied the doctrine against contracts in restraint of trade instead of the doctrine against restrictions on competition, but that the court saw the real vice in the combination is apparent from the latter part of the decision, where it said: "While these parties were in business, in competition with each other, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They could pay as high or low a price for grain as they saw proper and as they could make contracts with the producer. So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly against which the public interest had no protection." A contract for the sale of grain bags, the vendee to have the exclusive sale of them, the vendor not to sell to anyone else, entered into as part of a scheme to gain a monopoly of grain bags, is void as against public policy. This was held in *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102, where the court said: "While it is clear that public policy favors the utmost freedom of contracts within the limits of the law and requires that business transactions should not be fettered by unnecessary restrictions, yet agreements in restraint of competition, that threaten the public good, entered into with the object and view of controlling, and if necessary suppressing, the supply, and thereby enhancing the price of articles of actual necessity, that embrace in their evil effects all the territory and practically all the people of this great state, become a grave menace to the best interests of the

commonwealth, and therefore are opposed to sound public policy. . . . Plaintiff controlled three-fourths of all the bags which were in the state, or which would arrive within the ensuing six months, It held the bag market in its hands, for competition was gone, and the price demanded must be paid. These agreements were not entered into for the purpose of aggregating capital, nor for greater facilities in the conducting of their business, nor for the protection of themselves by a reasonable restraint upon active competitors, but for the purpose of regulating, controlling, and withholding the supply of bags, and thereby taking an unjust advantage of the farmers' necessities by disposing of the fruits of its unlawful labors at an unreasonable advance in price."

A question has arisen in regard to the sale of intoxicating liquors, as to whether a combination or contract restricting their sale is valid, since the policy of the law is against the unrestricted sale of such commodities. In *Anheuser-Busch Brewing Assn. v. Houck* (Tex. Civ. App.), 27 S. W. Rep. 692, while it was held that a combination among liquor dealers to control the beer traffic of a particular locality was illegal and void under the Texas anti-trust law, yet the agreement would have been valid at common law, for the reason that it was the policy of the law to restrict the sale of liquors and that a contract restraining the dealing in such commodity was of necessity in direct line with that policy, and hence could not be opposed to public policy nor illegal. To the same effect see *Harrison v. Lockhart*, 25 Ind. 112. Even in Illinois, where a combination to control the manufacture and sale of distillery products was, in *Distilling etc. Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, held illegal as creating a monopoly, the court in *Sell v. Brauen*, 70 Ill. App. 471, said: "Contracts held void because of their being in restraint of trade are so held upon the ground of public policy. It is difficult for us to see how a contract restricting the retail traffic of intoxicating liquors in a town can be considered against public policy." Even admitting, which is true, that it is the policy of the law to restrict the sale of liquors, such restrictive policy is to be found in state statutes and municipal ordinances, and the law allows perfect freedom in the sale of liquor outside of these restrictions. Since the law favors this perfect freedom within certain limits, restrictions imposed by private parties in excess of what is allowed by law must certainly be opposed to public policy instead of in harmony with it. Furthermore, in order that the private restriction should be in line with public policy it should be made with the same purpose in view that the law has when it imposes a restriction. But this is never the case, since the law aims at a moral end, while the restraint imposed by private contract has monopoly for its goal, its sole purpose being to stifle competition so that the combination may reap exorbitant profits. This same plea has been made as to combinations of railroads to maintain rates, and the answer was, as we have seen, that while the law favors restrict-

ing and regulating ruinous competition and rate wars among railroads for the protection of the public, this restriction must be made by the law, and the companies themselves cannot, by combining for their own ends, attempt to bring about the same result. *Nestor v. Continental Brew. Co.*, 161 Pa. St. 473, 41 Am. St. Rep. 894, is opposed to the doctrine of the cases criticised above and in line with what we believe to be the better rule. This was a case of a combination of dealers to regulate and control the price of beer in a designated city and county, and the court, in holding the combination illegal, said: "The appellants insist that restraint of trade in the necessities of life only is within the prohibition of public policy. No standard has been furnished by which to ascertain what constitute these with reference to the general public. But, assuming that beer is not among them, it is equally within the reach of the rule. The law recognizes it as a commodity, regulates its sale, it is 'an article of daily consumption,' and the court should refuse to aid in any attempted imposition upon the public by means of illegal combinations." The Nebraska supreme court in *State v. Nebraska Distilling Co.*, 29 Neb. 700, held a similar contract relating to liquors and alcohol illegal, and said with reference to the latter: "Alcohol is an article of commerce. It is applied to a thousand uses in arts and manufactures. The amount which is rectified and used as intoxicating drinks forms but a very small part of the quantity actually distilled, and, being an article of commerce, any contract creating a monopoly therein is against public policy and void." The same rule is applicable to the sale of liquors as a beverage. A statute may declare all such combinations illegal, even including contracts to give exclusive territory to a buyer, the buyer to sell no other kind of beer: *Texas Brew. Co. v. Templeman*, 90 Tex. 277; *Fuqua v. Pabst Brew. Co.*, 90 Tex. 298; *Texas Brew. Co. v. Anderson*, (Tex. Civ. App. 1897), 40 S. W. Rep. 737.

An association of dealers in sheep and lambs entered into an agreement with a butchers' association, the former to sell only to the latter and the latter only to the former, and it was held that the real nature and purpose of the agreement was to suppress competition and enhance prices, and was therefore illegal, though the public may, in fact, not have been injured: *Judd v. Harrington*, 139 N. Y. 105. A voluntary livestock association sought to evade the Kansas statute by organizing "to promulgate and enforce among the members correct and high moral principles in the transaction of business." But the court found that its real purpose and tendency were to prevent competition and maintain uniform prices, which made it an unlawful combination in restraint of trade within the meaning of the anti-trust law: *Greer v. Payne*, 4 Kan. App. 153; 46 Pac. Rep. 190. A similar association was held to violate the federal anti-trust law in *United States v. Hopkins*, 82 Fed. Rep. 529. The anti-trust laws do not generally apply to cases of real agency, where the agent agrees to buy only of the principal and to sell at a stated price: *Weiboldt v. Standard Fashion Co.*,

80 Ill. App. 67; *Welch v. Phelps etc. Co.*, 89 Tex. 653. The contract may be one of purchase and sale instead of agency, in which case the agreement will violate the anti-trust law, though it may have been valid at common law: *Columbia Carriage Co. v. Hatch*, 19 Tex. Civ. App. 120.

The case of *Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430, seems at first glance to be a border line case, but it was correctly decided. Here two parties intended independently each to form a corporation to ask for a franchise to supply water to a city. One of them contracted not to form a corporation and to allow the other to do so and to secure the franchise. One generally is not prohibited from selling his right to compete in a business, and he could certainly retire from business if he desired. In this case there would seem to have been no opportunity, in the application for the franchise, for any competition which could affect the price of water, and hence the public could not be concerned in the application of both, and again, since a monopoly would of necessity be created because there was but one franchise to be granted, there could have been no purpose to create a monopoly by stifling competition in the matter of supplying water to the city. The court held the agreement valid, and said: "Assuming that both the plaintiff and Cowan intended to apply for the franchise, and that the latter persuaded the former to abandon his purpose and aid him in the manner mentioned in the contract for the consideration promised, there was nothing immoral or that threatened the public interests or the public good in such an arrangement. If the business of a private individual or corporation is threatened with competition, it is not illegal or immoral if one can persuade his competitor to abandon an enterprise in which both cannot succeed, and take employment with the one remaining in the business at a stated compensation. Such an agreement, fairly entered into, is legitimate business. If the parties in this case deemed it for the interest of both that only one application should be made for a franchise that could be granted to but one of them, the arrangement does not, as I conceive, violate any settled rule or principle of public policy."

Combinations Relating to Insurance.—In the matter of insurance, the courts seem to have had but little opportunity to pass upon combinations to secure uniform rates prior to the passage of anti-trust laws. In *People v. New York Board of Fire Underwriters*, 54 How. Pr. 240, a corporation was formed for the purpose of establishing uniform insurance rates and requiring its members to follow such rates. The court held that the corporate charter conferred such power, and that a by-law of the corporation which bound members to maintain the rates of insurance agreed upon was directly within the power conferred and could not be attacked as being in restraint of trade or contravening public policy. The legislature probably has the power to pass a statute permitting insurance companies to organize to maintain rates of insurance. But a mere

corporate charter conferring, or attempting to confer, such a power would be subject to the general policy of law, since the existing law enters into and forms a part of every corporate charter. The policy of the law, at the present day at least, is against restrictions on competition which amount to a monopoly. So that, even in the absence of an anti-trust law, there would seem to be no reason why a combination of insurance companies for the purpose of maintaining rates and which does effect a monopoly should not be illegal and against public policy. The New York case cited may be correctly decided, but it must be on the theory that the statute permitted the combination, and it could not be against public policy, since public policy was determined by the act itself. If the corporation, however, had been organized under a general statute, a provision in the declaration of its corporate purposes the necessary effect of which is to create a monopoly would have been void as against public policy, as was decided in *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319. The anti-trust laws of many of the states have settled the question, and combinations to keep up insurance rates are within the condemnation of these acts. The insurance agents of Missouri attempted a unique evasion of the anti-trust law, organizing a "social club," and hired an employé of the one who issued rate books to act as secretary. Each policy written by an agent was put in an unsealed envelope, addressed to his company, and was then turned over to the secretary of the club, who compared it with the rate book, and, if the premium charged did not correspond therewith, he called upon the agent for an explanation. The members of the club had an oral agreement to abide by the rates fixed on penalty of a fine, and violaters of the agreement were tried by the club. The Missouri supreme court, however, in *State v. Fireman's Fund Ins. Co. (Mo.)*, 52 S. W. Rep. 595, very properly went behind this "social" organization, ascertained that its real and only purpose was to form a combination to maintain insurance rates, and declared it to be in violation of the anti-trust law. The decision is undoubtedly a correct exposition of the law, and the opinion itself forms very interesting reading in its ironical treatment of the "social club." A somewhat similar case, so far as its conclusions are concerned, is *Fire Ins. Cos. v. State*, 75 Miss. 24, which arose also under an anti-trust statute.

Combinations Relating to Patents.—A patent is in itself a monopoly, and the owner may not only neglect and refuse to make the patented article, but he may refuse to permit anyone else to do so, on any terms; he may also sell to another the right itself, or agree with him that he will permit no one else to use it: *Good v. Daland*, 121 N. Y. 1; *Morse Transit Drill etc. Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513. Such rights of the owner of a patent are not infringed by the anti-trust laws, and under such laws a patentee may still grant exclusive rights to licensees: *Clark v. Cyclone Woven-wire Fence Co. (Tex.)*, 54 S. W. Rep. 392. But to protect an individual in the monopoly he has in his patented article is quite a

different thing from protecting a combination among owners of various patents to establish a large monopoly which crushes out competition among the various patented articles. As was said in *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Am. St. Rep. 242, the rule about contracts in restraint of trade being void does not apply to patent rights, "means only that a trader may sell a patent right, or a secret in his trade or art, and restrain himself generally from the use of it, or from other acts which would lessen the value of the patent sold. And, of course, as a patent is a sort of monopoly, the owner may manufacture under it, or not, as he pleases, and may make either a partial or entire assignment of it, and may protect his assignee, not only by an agreement not to use the patent (which would be unnecessary, because such use would be an infringement), but by a covenant not to interfere in any way with the profits to be derived from the assigned patent. . . . But no case has been cited in which it has been held that several persons or companies can legally enter into a business combination to control the manufacture, or sale, or price of a staple of commerce merely because some of the contracting parties have letters patent for certain grades of that staple." The nearest approach to a case holding a combination of patent owners to be valid is *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, which we have had occasion to criticise elsewhere. *National Harrow Co. v. Hench*, 76 Fed. Rep. 667, is a well-considered case holding such a combination illegal. The court said: "I am not aware that such a far-reaching combination as is here disclosed has ever been judicially sustained. On the contrary, the courts have repeatedly adjudged combinations between a number of persons engaged in the same general business to prevent competition among themselves, and maintain prices, to be against sound public policy, and therefore illegal. I am not able to concur in the view that the principle of these cases is inapplicable here, because the agreement in question involves patents. It is true that a patentee has the exclusive control of his invention during the life of the patent. He may practice the invention or not, as he sees fit, and he may grant to others licenses upon his own terms. But where, as was the case here, a large number of independent manufacturing concerns are engaged in making and selling, under different patents and in various forms, an extensively used article, competition between them is the natural and inevitable result, and thereby the public interest is promoted. Therefore, a combination between such manufacturers, which imposes a widespread restraint upon the trade, and destroys competition, is as injurious to the community, and as obnoxious to sound public policy, as if the confederates were dealing in unpatented articles. To the present case may well be applied the remarks of the supreme court of Pennsylvania in *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159: 'This combination has a power in its confederated form which no individual action can confer.' By the united action of more than a score of

different manufacturers, natural and salutary competition is destroyed. To sanction such a result, because accomplished by a combination of patentees, would be, I think, to pervert the patent laws." The same result was reached in *National Harrow Co. v. Bement*, 21 N. Y. App. Div. 290, where the rights of the same corporation were in litigation. In *Strait v. National Harrow Co.*, 18 N. Y. Supp. 224, it was held that a combination between the owners of patents was illegal where the combination was to extend for fifty years beyond the lifetime of any patent, but the general question itself of the right of patentees to form a combination was not passed upon.

Combinations Relating to the Publication of News.—So far as we are aware, but two cases have arisen which have dealt with this question. Both related to the corporation known as the Associated Press, and the holding in one was that the combination was lawful, in the other that it created an illegal trust. While under the first holding, that in New York, there was no anti-trust law on the statute books, and in the latter case, which arose in Illinois, there was such an act, yet the existence or nonexistence of such a statute seems not to have been the pivotal point in either case. In the New York case—*Matthews v. Associated Press*, 136 N. Y. 333, 32 Am. St. Rep. 741—the plaintiffs were entitled to receive news from the defendant under a contract, but were under a covenant, which was enforceable by a penalty, not to use news from any other source. In violation of this covenant, the plaintiffs secured news from another source, and the defendant refused to supply them further. The plaintiffs secured a temporary injunction restraining defendant from depriving the plaintiffs of the news which they had been accustomed to receive. A by-law of the defendant, known to and acquiesced in by the plaintiffs, permitted the defendant to withhold its news from any paper using news derived from any other source. The plaintiffs contended that the by-law and the covenant they were under not to publish news from any other source were unreasonable and oppressive, and tended and were expressly intended to restrain trade and competition and to create a monopoly. The court held that if the by-law effected these results it would be illegal, and that it was a question of construction whether it did or not. In holding the by-law valid, the court, through Peckham, J., said: "We do not think the by-law improperly tends to restrain trade, assuming that the business of collecting and distributing news would come within the definition of a trade. The latest decisions of the courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. . . . Here are a number of persons who are owners of, or interested in, various newspapers in the state outside of the city of New York. They enter into business relations with each other, to a certain extent, through the form of an organization known as a corporation, and for the purpose,

among others, of collecting and supplying themselves with telegraphic news. The greater the number belonging to the organization the larger will be its income and the greater amount it will be able to spend for making the collection of news, and the more efficient and valuable such collection will be. To suppress competition in such chosen field among themselves, and to thus enhance the value of the property and the conveniences arising from the extended use of the means and opportunities of the association, it would seem appropriate to provide that the members of such association should not take news from any other. . . . A business partnership could provide that none of its members should attend to any business other than that of the partnership, and that each partner who came in must agree not to do any other business and must give up all such business as he had theretofore done. Such an arrangement would not be in restraint of trade, although its direct effect might be to restrain to some extent the trade which had been done. It seems to me this by-law is a natural and reasonable restraint upon the members of the association." Its real effect in fostering a news monopoly seems not to have been appreciated by the court. In strong contrast with this decision is the opinion of the Illinois supreme court in *Inter-Ocean Pub. Co. v. Associated Press (Ill.)*, 56 N. E. Rep. 822, where the facts were similar to those in the New York case. In speaking of the public nature of the corporation, the court said: "The organization of such a method of gathering information and news from so wide an extent of territory as is done by the appellee corporation, and the dissemination of that news, requires the expenditure of vast sums of money. It reaches out to the various parts of the United States, where its agents gather news which is wired to it, and through it such news is received by the various important newspapers of the country. Scarcely any newspaper could organize and conduct the means of gathering the information that is centered in an association of the character of the appellee because of the enormous expense, and no paper could be regarded as a newspaper of the day unless it had access to and published the reports from such an association as appellee. . . . The manner in which that corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent of the interest it has thus created in the public in its private property." And in declaring that part of the contract and the by-law which fostered the monopoly void, this language was used: "The clause of the contract in this case which sought to restrict appellant from obtaining news from other sources than from appellee is an attempt at restriction upon the trade and business among the citizens of a common country. Competition can never be held hostile to public interests, and efforts to prevent competition by contract or otherwise can never be looked upon with favor by the courts. . . . The by-law of the appellee

corporation, above referred to, is not required for corporate purposes, nor included within the purposes of the creation of the corporation. To enforce the provisions of the contract and this by-law would enable the appellee to designate the character of the news that should be published, and, whether true or false, there could be no check on it by publishing news from other sources. Appellee would be powerful in the creation of a monopoly in its favor, and could dictate the character of the news it would furnish, and could prejudice the interests of the public. Such a power was never contemplated in its creation, and is hostile to public interests. That by-law tends to restrict competition, because it prevents its members from purchasing news from any other source than from itself. It seeks to exclude from publication, by any of its members, news procured from any other corporation or source than itself which it declares antagonistic to it. Its tendency, therefore, is to create a monopoly in its own favor, and to prevent its members from procuring news from others engaged in the same character of work, and such provision is illegal and void." The tendency of the decisions is certainly in favor of the Illinois rule. It must be noticed that the monopoly was not caused by a combination of producers of a commodity or of vendors of a commodity, which is usually the case. The Associated Press was the only producer and the only vendor, and the monopoly feature arose solely out of the covenant of the vendees (and the by-law) not to secure the commodity from any other source. It may be true that generally a vendor may exact a covenant of his vendee (the vendee consenting) that he will purchase from no one else, and such covenant would not be void as improperly restraining trade. But where the object of such a covenant is to control the supply (in this case of news) and to suppress all other sources of supply, the inevitable tendency is to create a monopoly, and the interests of the public are threatened. Consult in connection with this the case of *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102. There is no doubt about the Associated Press being a monopoly, perhaps the most extensive one in the country, and, under the Illinois rule, it is such a one as is condemned by the law as an illegal trust.

Combinations of Labor or in the Interest of Labor.—Laborers are subject to no exception in the matter of restraining competition so as to form a monopoly. They do not constitute a favored class. Rules of law are applicable to rich and poor alike. All combinations, whether of capitalists or workmen, for the purpose of influencing trade in their special favor by raising or reducing prices are so far illegal that agreements to combine cannot be enforced by the courts: *More v. Bennett*, 140 Ill. 69, 33 Am. St. Rep. 216. Care must be taken, however, to ascertain whether the combination is of such a character that the law condemns it. Anyone may, as a general rule, lawfully refuse to work for, or to deal with, any man or class of men, and a number of men may agree to do the same thing. Hence it has been held that an agreement between the members of a

retail lumber association that they will not deal with any wholesale dealer or manufacturer who sells to customers, not dealers, at a point where a member of the association is doing business, is not void as stipulating for an unlawful combination in restraint of trade: *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 40 Am. St. Rep. 319. In this case the court points out the error courts are likely to fall into in dealing with such questions of combinations of laborers, and exceed the limits of their jurisdiction under the influence of terms of such illusive meaning as "monopolies," "trusts," "boycotts," "strikes," and the like. *Macauley v. Tierney*, 19 R. I. 255, 61 Am. St. Rep. 770, is a somewhat similar case, in which the court held that an agreement among the members of a master plumbers' association not to deal with wholesalers who sell plumbers' supplies to those not members of the association was not unlawful, though its purpose was to free themselves from the competition of those who were not members. The agreement itself was, in reality, an act of competition. Instead of restraining competition, it accentuated it. To be sure, if they were completely successful, the other plumbers, not members of the association, would be out of means of employment. But this result would follow as to any competition, if completely successful. A grocer, who reduces prices to injure other grocers and draw trade from them, if completely successful, establishes a monopoly. But the means employed are those of competition. If, however, a real combination is formed, whose sole purpose and inevitable tendency are to so restrict competition as to create a monopoly, an illegal trust is created which the law will not recognize. Hence an agreement between the members of a stenographers' association to be bound by a schedule of prices to be fixed by the association, and not to compete with each other by taking or offering to take a less price, is contrary to public policy and nonenforceable: *More v. Bennett*, 140 Ill. 69, 33 Am. St. Rep. 216. This case goes very far indeed, since the number of stenographers in the association seems to have included but a small portion of the stenographers in the city. But the court said that the determining circumstance is "a combination or conspiracy among a number of persons engaged in a particular business to stifle or prevent competition, and thereby to enhance or diminish prices to a point above or below what they would have been if left to the influence of unrestricted competition. All such combinations are held to be contrary to public policy, and the courts, therefore, will refuse to lend their aid to the enforcement of the contracts by which such combinations are sought to be effected. Counsel seek to distinguish this case from those cited by the circumstance alleged in the second count of the declaration, that but a small portion of law stenographers of Chicago belong to said association. An analogy is thereby sought to be raised between the contract in this case and those contracts in partial restraint of trade which the law upholds. We think the analogy thus sought to be raised does not exist. Contracts in partial restraint of trade which the law sustains are those

which are entered into by a vendor of a business and its goodwill with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased; but in the present case there is no purchase or sale of any business, nor any other analogous circumstance giving to one party a just right to be protected against competition from the other. All of the members of the association are engaged in the same business within the same territory, and the object of the association is purely and simply to silence and stifle all competition as between its members. No equitable reason for such restraint exists, the only reason put forward being that, under the influence of competition as it existed prior to the organization of the association, prices for stenographic work had been reduced too far, and the association was organized for the purpose of putting an end to all competition, at least as between those who could be induced to become members. True, the restraint is not so far-reaching as it would have been if all the stenographers in the city had joined the association, but, so far as it goes, it is precisely of the same character, produces the same results, and is subject to the same legal objection." There would seem to us to be a material difference between a combination of the character under consideration above and one in which all, or so nearly all, or so large a number of the stenographers of a city, were members of the combination that a virtual monopoly would result and prices could be effectively controlled. This distinction was noticed in *Herriman v. Menzies*, 115 Cal. 16, 56 Am. St. Rep. 81. It does not appear in this case how large a percentage of the stevedores of the city were interested in the combination, but the principle asserted by the court was this: "A monopoly exists where all, or so nearly all, of an article of trade or commerce within a community or district is brought within the hands of one man or set of men as to practically bring the handling or production of the commodity or thing within such single control to the exclusion of competition or free traffic therein. Anything less than this is not a monopoly. . . . Assuming that the business of stevedoring is a thing which is the proper subject of a monopoly within this definition, there is nothing in this agreement to render it obnoxious to that objection, nor anything to show that it will operate to unlawfully restrain trade. It nowhere appears therefrom that the parties to this contract, by the combination of their business interests provided for, are in the control, or anything like the control, of that business in San Francisco to an extent to enable them to exclude competition therein, or control the price of such labor or business. There is absolutely nothing to show that they comprise more than the most insignificant part or fraction, either in number or volume of business, of those engaged in that trade in this community. We are not at liberty to indulge in in-

ferences which would restrict the parties in their right to combine their interests." The principle we have already alluded to is sufficient to control these cases, viz., that where both the purpose and the inevitable tendency of the combination or agreement are to so restrict competition as to create a virtual monopoly, the combination or agreement is illegal. It is not necessary that a complete monopoly should result, if the tendency of the combination is to form one. In *Milwaukee etc. Assn. v. Niezerowski*, 95 Wis. 125, 60 Am. St. Rep. 97, four-fifths of the masons and builders of a city formed an association, a private by-law of which required each member to submit all bids, proposed to be made by him, to such association, and, if found to be the lowest bidder and entitled to the contract, to add to such bid, before submitting it to the owner or architect of the proposed building, six per cent of the contract price, which he is to pay to the association, and thus exact from owners six per cent in excess of a fair price. It was held that the arrangement was an unlawful combination, contrary to public policy, and void, as its manifest purpose was to suppress fair and free competition in bidding for building contracts. "The true test," said the court, "of the illegality of a combination to restrain business or trade is its effect upon the public interests; that is to say, of those outside of the combination." As was said in *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678, which was a case of a combination between bidders for the collection of public taxes: "The true inquiry is, Is it the natural tendency of such an agreement to injuriously influence the public interests? The rule is, that agreements which, in their necessary operation upon the action of the parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public, or of third parties, are against the principles of sound public policy, and are void." In *Bailey v. Association of Master Plumbers* (Tenn.), 52 S. W. Rep. 852, most of the plumbers of Memphis had formed an association, a by-law of which required that any member doing work in competition with another member should pay into the association a fixed sum according to a schedule agreed upon. In holding the arrangement illegal the court said: "It can avail nothing that the membership of the association involved in this litigation does not include all plumbers in the city of Memphis, and that the by-law in question relates alone to business done in that city. Being in restraint of trade, and injurious to the public, as heretofore shown, the by-law is contrary to public policy, illegal, and void, notwithstanding the fact that the restraint is partial in respect to the persons implicated, and the territorial limits affected. It is not the number of persons participating in the by-law, or the extent of the territory included, but the injury to the public in that territory, however restricted, that characterizes the interruption of trade as illegal." An agreement between a labor union and a board of education that the latter shall insert, in all contracts for work upon school buildings a pro-

vision that none but union workmen shall be employed and placed upon the pay-rolls of the board is void, because such a contract tends to create a monopoly and to restrict competition in bidding for work: *Adams v. Brenan*, 177 Ill. 194, 69 Am. St. Rep. 222. Similarly, a city ordinance requiring all contracts for city printing to be awarded to union shops only, or to such as are able to show the union label, in accordance with an agreement with a labor union, is illegal and void, as tending to create a monopoly and impose an additional burden on taxpayers: *Holden v. Alton*, 179 Ill. 318. And an ordinance requiring the paving cement to be prepared from asphaltum obtained from a certain lake is illegal, since it tends to create a monopoly, and to prevent competition, where it is shown that such lake is owned by a single corporation, and that the asphaltum obtained from it is no better than that obtained elsewhere and used by competing manufacturers: *Fishburn v. Chicago*, 171 Ill. 338, 63 Am. St. Rep. 236.

Whether the Commodity Must be a Necessary of Life, or not, in order to stamp a combination concerning it as an illegal trust, has been a matter of some conflict, but the conflict seems to be growing continually less as the real nature and effect of such combinations are more clearly discerned. Even where the rule prevails at common law that an illegal combination or trust cannot be created unless the commodity concerned is a necessary of life, yet a trust law may be framed which condemns combinations as to all commodities irrespective of their character: *Pasteur Vaccine Co. v. Burkey* (Tex.), 54 S. W. Rep. 804.

Assuming for the moment that the combination must concern a necessity of life, the following articles have been held of such necessity as to make a combination in them illegal—coal: *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159; *Arnot v. Pittston Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190; *Drake v. Siebold*, 81 Hun, 178; gas: *Gibbs v. Consolidated Gas Co.*, 130 U. S. 408; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319; *Chicago Gas-light etc. Co. v. People's Gas-light etc. Co.*, 121 Ill. 530, 2 Am. St. Rep. 124; *San Antonio Gas Co. v. State* (Tex.), 54 S. W. Rep. 289; *State v. Portland etc. Co.*, 153 Ind. 483, post, p. 314; matches: *Richardson v. Buhl*, 77 Mich. 632; lumber: *Santa Clara Valley Mill etc. Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211; cotton bagging: *India Bagging Assn. v. Kock*, 14 La. Ann. 164; butter: *Chapin v. Brown*, 83 Iowa, 156, 32 Am. St. Rep. 297; grain: *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; salt: *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Clancey v. Onondaga Fine Salt Co.*, 62 Barb. 395; alcohol: *State v. Nebraska Distilling Co.*, 29 Neb. 700; beer: *Nester v. Continental Brewing Co.*, 161 Pa. St. 473, 41 Am. St. Rep. 894; distilling products: *Distilling etc. Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200; candles: *Emery v. Ohio Candle Co.*, 47 Ohio St. 320, 21 Am. St. Rep. 819; milk: *Ford v. Chicago Milk Shippers' Assn.*, 155 Ill. 166; *People v. Milk Exchange*, 145 N. Y. 267;

45 Am. St. Rep. 609; preserves: *American Preservers' Trust v. Taylor Mfg. Co.*, 46 Fed. Rep. 152; *Bishop v. American Preservers' Co.*, 157 Ill. 284, 48 Am. St. Rep. 317; cloth: *Hilton v. Eckersley*, 6 El. & B. 47; grain bags: *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102; harrows: *National Harrow Co. v. Hench*, 76 Fed. Rep. 667; *National Harrow Co. v. Bement*, 21 N. Y. App. Div. 290; *Strait v. National Harrow Co.*, 18 N. Y. Supp. 224; brick: *Jackson v. Brick Assn.*, 53 Ohio St. 303, 53 Am. St. Rep. 637; gas, sewer, and other pipe: *United States v. Addyston Pipe etc. Co.*, 85 Fed. Rep. 271; affirmed, 175 U. S. 211; rules: *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596, 63 Am. St. Rep. 736; powder: *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Am. St. Rep. 242; pressed metal parts: *Fox etc. Steel Co. v. Schoen*, 77 Fed. Rep. 29; gelatine capsules: *Merz Capsule Co. v. United States Capsule Co.*, 67 Fed. Rep. 414; woodenware: *Cravens v. Carter-Crume Co.*, 92 Fed. Rep. 479; sugar: *People v. North River Sugar etc. Co.*, 121 N. Y. 582, 18 Am. St. Rep. 843; oil: *State v. Standard Oil Co.*, 49 Ohio St. 137, 34 Am. St. Rep. 541; meat: *Judd v. Harrington*, 139 N. Y. 105; *United States v. Hopkins*, 82 Fed. Rep. 529; news: *Inter-Ocean Pub. Co. v. Associated Press (Ill.)*, 56 N. E. Rep. 822; wire cloth: *De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co.*, 14 N. Y. Supp. 277; envelopes: *Cohen v. Berlin etc. Envelope Co.*, 56 N. Y. Supp. 588; fire alarm telegraph instruments: *Telegraph Co. v. Crane*, 160 Mass. 50, 39 Am. St. Rep. 458; blue stone: *Cummings v. Union Blue Stone Co.*, 15 N. Y. App. Div. 602; cigarettes: *People v. Duke*, 44 N. Y. Supp. 336, 19 Misc. Rep. 292.

Insurance, carriage, and labor are necessary commodities in which a monopoly cannot be formed. It has been held that the following are not necessities—washing machines: *Dolph v. Troy Laundry etc. Co.*, 28 Fed. Rep. 553; curtain fixtures: *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; sewing machines: *Bi-spool Sewing Mach. Co. v. Acme Mfg. Co.*, 154 Mass. 404; glue: *Gloucester etc. Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 26 Am. St. Rep. 214.

It has certainly been asserted in many cases that a combination, in order to be illegal, must affect the production and sale of some article that is a necessity of life. Most of the cases in which such a statement has been made, however, were those in which the combination in question affected a necessity of life and cannot, therefore, be said to have limited the rule to that extent: See *Richardson v. Buhl*, 77 Mich. 632. In a few cases, however, the question as to whether the commodity was a necessity of life or not seems to have been one of the determining elements. Such is true of *Gloucester etc. Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 26 Am. St. Rep. 214, where glue was deemed not to be a sufficiently necessary article to condemn a combination made in regard to its manufacture and sale. The same is true of *Dolph v. Troy Laundry etc. Co.*, 28 Fed. Rep. 553, where the combination was in washing machines, and of *Central Shade Roller Co. v. Cushman*, 143 Mass.

353, where curtain fixtures were the commodities concerned. The weight of authority and the growing tendency of the courts is to disregard the question as to whether the article is a necessity of life or not, and this is certainly the reasonable and common sense view to take. In commenting on the two Massachusetts cases cited above, the court, in *United States v. Addyston Pipe etc. Co.*, 85 Fed. Rep. 271, said: "In these cases, it was held that contracts in restraint of trade are not invalid if they affect trade in articles which, though useful and convenient, are not articles of prime necessity, and therefore contracts between dealers made to secure complete control of the manufacture and sale of such articles were supported. In the first case, the article involved was a fastening of a certain shade roller, and in the other was glue made from fish skins. We think the cases hereafter cited show that the common-law rule against restraint of trade extends to all articles of merchandise, and that the introduction of such a distinction only furnishes another opportunity for courts to give effect to the varying economical opinions of its individual members. It might be difficult to say why it was any more important to prevent restraints of trade in beer, mineral water, leather cloth, and wire cloth than of trade in curtain shades or glue. However this may be, the cases do not touch the case at bar, because the same court, in *Telegraph Co. v. Crane*, 160 Mass. 50, 39 Am. St. Rep. 458, held that fire alarm telegraph instruments were articles of sufficient public necessity to render unreasonable restraints of trade in them void, and certainly such articles are not more necessary for public use than water, gas, and sewer pipe."

In *Nester v. Continental Brewing Co.*, 161 Pa. St. 473, 41 Am. St. Rep. 894, the court, in disregarding the distinction that the combination must concern necessities of life, said: "The appellants insist that restraint of trade in the necessities of life only is within the prohibition of public policy. No standard has been furnished by which to ascertain what constitutes these with reference to the general public. But, assuming that beer is not among them, it is equally within the reach of the rule. The law recognizes it as a commodity, regulates its sale, it is 'an article of daily consumption,' and the court should refuse to aid in any attempted imposition upon the public by means of illegal combinations. The fact that coal was 'an article of prime necessity' was not mentioned as essential to the illegality of the combination which was involved in *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159, but was suggested, arguendo, as an aggravation of the injury done the public. The whole course of discussion there shows that injury to the public was regarded as the true test of illegality." That an article must be one of necessity was discarded as a test in *Cummings v. Union Blue Stone Co.*, 15 N. Y. App. Div. 602, where the article was blue stone. In *People v. Duke*, 44 N. Y. Supp. 336, 19 Misc. Rep. 292, where the combination was in cigarettes, the court said: "The weight of recent authority seems to support the proposi-

tion that the character of the trade sought to be monopolized is of no concern as long as it be a lawful one." To the same effect, see *National Harrow Co. v. Bement*, 21 N. Y. App. Div. 290.

What Are Not Defenses to an Illegal Trust.—It is no defense for an illegal trust to say that its monopoly has in fact resulted in the reduction of the price of the commodity. As was pointed out in *Richardson v. Buhl*, 77 Mich. 632: "That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree." And in *State v. Standard Oil Co.*, 49 Ohio St. 137, 34 Am. St. Rep. 541, it was said: "Much has been said in favor of the objects of the Standard Oil trust and what it has accomplished. It may be true that it has improved the quality and cheapened the cost of petroleum and its products to the consumer. But such is not one of the usual or general results of a monopoly; and it is the policy of the law to regard, not what may, but what usually, happens. Experience shows that it is not wise to trust human cupidity where it has the opportunity to aggrandize itself at the expense of others. The claim of having cheapened the price to the consumer is the usual pretext on which monopolies of this kind are defended." A similar defense was made in *People v. Milk Exchange*, 145 N. Y. 267, 45 Am. St. Rep. 609, to which the court replied: "It may be claimed that the purpose of the combination was to reduce the price of milk, and that, it being an article of food, such reduction was not against public policy. But the price was fixed for the benefit of the dealers, and not the consumers, and the logical effect upon the trade of so fixing the price by the combination was to paralyze the production and limit the supply, and thus leave the dealers in a position to control the market, and, at their option, to enhance the price to be paid by the consumers. This brings the case within the condemnation of the authorities to which we have referred."

The anti-trust laws equally discredit such a defense as was pointed out in *San Antonio Gas Co. v. State* (Tex.), 54 S. W. Rep. 289: "If the combination was made, and its object was in restraint of trade and to create a monopoly, the statute denounces it, no matter if the immediate result of the combination may be the temporary reduction of prices. To fix, by combination, a rate lower than one that has prevailed, carries with it the power and ability to establish higher ones and the object of the statute is to free business and commerce from being controlled by combinations, whether of persons or corporations. It does not matter that the immediate result of combination may be a reduction in the price of commodities—a dangerous arbitrary power has been lodged in its hands, by which the business of the country may be absolutely dominated, and prices arbitrarily controlled, regardless of the laws of trade or the rules of supply and demand. . . . The state is unwilling to intrust to any combination, even though of her creatures, the tyrannical and oppressive power that is inseparably connected with the power to

raise and lower prices of commodities and control the trade of the country."

Again, it is no defense that a complete monopoly has not been established. "All the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition": *United States v. E. C. Knight Co.*, 156 U. S. 1; *Addyston Pipe etc. Co. v. United States*, 175 U. S. 211; affirming 85 Fed. Rep. 271.

Some of the courts seem to have gone astray upon the proposition that combinations are legal if the public does not appear to have been injured by the agreement: *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; *Rafferty v. Buffalo City Gas Co.*, 37 N. Y. App. Div. 618. In the first case, it was said that "we cannot assume that the purpose and effect of the combination are to unduly raise the price of the commodity. A natural purpose and a natural effect are to maintain a fair and uniform price, and to prevent the injurious effects both to producers and customers of fluctuating prices caused by undue competition. When it appears that the combination is used to the public detriment, a different question will be presented from that now before us. The contract is apparently beneficial to the parties to the combination, and not necessarily injurious to the public; and we know of no authority or reason for holding it to be invalid as in restraint of trade or against public policy." If this case had arisen to-day, perhaps the inevitable tendency of a monopolistic combination to raise prices would have been more apparent to the court. The obvious reply to such a contention, however, is that which was made in *Anheuser-Busch Brew. Assn. v. Houck* (Tex. Civ. App.), 27 S. W. Rep. 692: "The effect on the public of an agreement which is against public policy is not essential; the tendency is enough to bring it within the condemnation of the courts." And in *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, the language was equally strong: "Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public." To the same effect, see *State v. Portland etc. Co.*, 153 Ind. 483; *Anderson v. Jett*, 89 Ky. 375; *Judd v. Harrington*, 139 N. Y. 105; *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678.

Anti-trust Statutes.—A detailed consideration of anti-trust laws passed in the various states or of the federal anti-trust law is rendered unnecessary by the fact that they are based upon the same principles of public policy that we have already been considering. They re-enforce and extend the common law, and render more certain the law's condemnation of combinations which restrict competition and create monopolies, but they are fundamentally the same as the common law. We should, however, call attention to one unexpected result which has been caused by this legislation. The fed-

eral anti-trust law which furnishes the best example of this is aimed not only at combinations which restrict competition and form monopolies, but by its terms is directed against any and all restraints upon trade. So far as ordinary contracts in restraint of trade are concerned, the common law had already worked out just and equitable doctrines, and this branch of the subject could have been wisely omitted from the statute. But, by reason of the confusion of the two doctrines of ordinary restraints upon trade and of restrictions upon competition, to which we have already called attention, the federal law was framed so as to include both. In consequence, the courts have been compelled to hold that the act aims at all restraints upon trade, however reasonable they may be, and whether their tendency is to form a monopoly or not. Under the federal act it would seem that if the business-concerns interstate or foreign commerce, an ordinary sale of a business with the usual covenant against the vendor preventing him from conducting a similar business would be an illegal restraint of trade, however reasonable the restriction might be and however necessary to preserve to the vendee the legitimate fruits of his purchase. Such a result was certainly never intended, and it may be unfortunate that it has been accomplished: See *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States v. Coal Dealers' Assn.*, 85 Fed. Rep. 252; *United States v. Hopkins*, 82 Fed. Rep. 529.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

INDIANAPOLIS UNION RAILWAY COMPANY v. DOHN.

[153 INDIANA, 10.]

RAILROADS — SPECIAL PRIVILEGES ON STATION GROUNDS.—A company organized under a statute providing for the incorporation of union railway companies has an undoubted right to make rules and regulations concerning the use of its station and grounds, but it has no power, under the guise of such rules and regulations, to grant to a transfer company the exclusive privilege of standing hacks upon its station grounds, and soliciting business.

MONOPOLIES — SPECIAL PRIVILEGES AT RAILWAY DEPOTS.—It is against public policy to permit a union railway company to exclude from its station grounds all hackmen but one, to whom it has rented the exclusive privilege of standing hacks thereon and soliciting business, thus creating a monopoly and protecting a contract from which it derives a revenue.

Baker & Daniels, for the appellant.

Schuyler Haas, for the appellee.

10 BAKER, J. Suit to enjoin appellee from entering upon the station grounds of appellant to solicit customers for his hack. The question arises upon appellant's exception to the conclusion of law upon the facts specially found.

The facts are briefly these: Appellant is a corporation composed of various railway companies, and organized under the act of March 2, 1885: Acts 1885, p. 30; Burns' Rev. Stats. 1894, secs. 5232-5250; Horner's Rev. Stats. 1897, secs. 3964a-3964s. Appellee is the driver of a public conveyance, commonly called a hack, engaged in the business of transporting persons without discrimination from place to place in and about Indianapolis.

Appellant owns the union passenger station at Indianapolis. It acquired the ground partly by condemnation and partly by purchase. The station building faces north. The tracks are south of the building under a train-shed. At the north ¹¹ of the building is an open area, bounded on the north by Jackson Place street, on the east by McCrea street, on the south by the station building, and on the west by Illinois street. The distance from Jackson Place street to the station building is sixty-seven feet. Along the north line of the building is a sidewalk sixteen feet wide. The residue of the area is paved and used as a driveway to and from the entrance, which is at the center of the north front. This condition has continued ten years. Appellant by contract undertook to give the Frank Bird Transfer Company the exclusive right to stand hacks on the area and solicit business of persons leaving the station. Employés of the transfer company were accustomed to stand their hacks upon the area at all hours of day and night and for such length of time as they pleased. Intending passengers were allowed to alight at the entrance of the station building from their private conveyances or from public ones that had been employed to bring them there. Arriving passengers were permitted to be met at the entrance by their private conveyances or by public ones previously engaged to meet them. All other vehicles except the transfer company's were excluded from the area. Appellant has had rules in force to this effect for many years. The city by ordinance permitted hacks to stand along the west side of McCrea street. An ordinance forbade hackmen to approach the station building nearer than fifteen feet to solicit business. Appellee, within three weeks before the commencement of this suit, at last a dozen times drove his hack upon the area outside of the sidewalk when he had no passenger to be discharged or to be received, and stayed from half an hour to an hour at a time soliciting business from arriving passengers. Appellant several times told him that he should leave, that he was violating appellant's rules and regulations, and that he was trespassing on private property. Appellee each time refused to leave, stating that he had the right to stand his hack on the area so long as the transfer company was permitted to stand its hacks there, and that he intended to continue ¹² to come upon the area so long as the transfer company was given that privilege.

From this finding it does not appear that appellee's conduct was boisterous, or that he was interfering with appellant in the discharge of its duties to the passengers of the proprietary and

associate railway companies, or that he was annoying or interfering with the passengers, or that he was refusing to comply with any rule or regulation of appellant's that applied to all hackmen.

Appellant has the undoubted right to make rules and regulations concerning the use of its station and grounds: *Lucas v. Herbert*, 148 Ind. 64. The term, "rules and regulations," however, implies uniformity in operation, not discrimination for the pecuniary advantage of the promulgator. The question is not what rules, uniform in application and promulgated by appellant impartially in the interests of the traveling public and without a money consideration to itself, might be held reasonable and what unreasonable, but whether appellant may, under the guise of rules, exclude from its station grounds all hackmen but one and thus protect a contract from which it derives a revenue.

A collection of authorities is made in *Lucas v. Herbert*, 148 Ind. 64. To them may be added *In re Palmer etc. Ry. Co.*, L. R. 6 Com. P. 194; *Parkinson v. Great Western Ry. Co.*, L. R. 6 Com. P. 554; *New York etc. Ry. Co. v. Scovill*, 71 Conn. 136, 71 Am. St. Rep. 159; *State v. Reed*, 76 Miss. 211, 71 Am. St. Rep. 528.

The majority of the English cases appear to sustain, and the the majority of the American to deny, the right of a railway company to grant such an exclusive privilege: See the note of Mr. Freeman in 22 Am. St. Rep. 699-702, and the note of Mr. Lewis in 5 Am. R. R. & Corp. Rep. 715-724.

In some of the cases constitutional and statutory provisions enter into the determination, but in the main the question is decided from the points of view of the powers of the corporation and of public policy.

¹³ By the governing act appellant is authorized "to regulate the use of its depots, stations, structures, appliances, and facilities." Appellant has only the powers that are expressly granted and those that are necessary to the exercise of express grants. The act is searched in vain for appellant's authority to discriminate. If, under regulations that are uniform and impartial, equality fails by reason of limited facilities, appellant would not be at fault.

Appellant acquired its grounds through the sovereign right of eminent domain, whether by purchase or by condemnation; for it could not obtain a broader right by grant than by force. Taking the land by the right of the state, for the purposes of

public business, appellant should not be permitted to grant special privileges and immunities that the state could not.

The city of Indianapolis is given the right to regulate the use of its streets by hacks. The city would hardly undertake to exclude all but one hack from the stand on McCrea street in order to make good a rental for the exclusive privilege. The state intrusted appellant with the right to regulate the use of its facilities, not to increase its revenues by creating a monopoly.

Appellant is chartered to furnish depot and switching facilities to its proprietary and associate companies in connection with the transportation of persons and property on their railroads, not to engage in the hack business upon the streets of Indianapolis. True, appellant only rented its grounds to the transfer company. But the only use of the grounds, of advantage to the transfer company, is to base thereon the use of the streets for revenue. If appellant has authority to grant that advantage to another, it may take it to itself.

The passengers' payment for transportation includes payment for their common use of the station facilities. If they are not entitled to have appellant use those facilities disinterestedly for their advantage, they are at least entitled to ¹⁴ have appellant refrain from coercing them into yielding further tribute. For, under threat of having otherwise to leave the grounds, they pay a fare that necessarily includes appellant's rental. Appellant's action tends to restrict competition and to enhance prices, and is therefore against public policy: *Consumers Oil Co. v. Nunnemaker*, 142 Ind. 560, 51 Am. St. Rep. 193.

Appellant sought from a court of equity the extraordinary remedy of injunction. It has failed to show any ground for equitable interposition.

Judgment affirmed.

RAILROADS—GRANT OF EXCLUSIVE PRIVILEGE TO HACKMEN ON DEPOT GROUNDS.—A railroad company cannot grant to one hackman, or line of hacks and omnibuses, the exclusive right to occupy a place upon its depot grounds, for it tends to discourage competition and to create a monopoly. It is, therefore, against public policy: *Kalamazoo Hack etc. Co. v. Sootsma*, 84 Mich. 194, 22 Am. St. Rep. 693, and monographic note thereto on the right of carriers and passengers to grant exclusive privileges or preferences to hackmen or other solicitors. *Contra New York etc. R. R. Co. v. Seovill*, 71 Conn. 136, 71 Am. St. Rep. 159, and note.

MALOTT v. SHIMER.

[153 INDIANA, 85.]

RECEIVERS—SUIT AGAINST, WITHOUT LEAVE.—A federal receiver for a railroad company may be sued in a state court, without previous leave of the court which appointed him, for damages on account of the death of an employè of the receiver, caused by the latter's alleged negligence while operating the road.

DAMAGES FOR NEGLIGENCE CAUSING DEATH—WHEN NOT EXCESSIVE.—In an action to recover for the death of the plaintiff's intestate caused by alleged negligence, a verdict for five thousand dollars is not excessive where the evidence shows that the decedent, at the time of his death, was fifty years of age, and in good health; that he had been in the United States postal service seventeen or eighteen years, receiving a salary of eleven hundred and fifty dollars per annum; that he left a widow and two sons, aged nineteen and fourteen respectively, dependent upon him for support; and that his expectancy of life was almost twenty-one years.

NEGLIGENCE CAUSING DEATH—EVIDENCE.—In an action to recover damages for death caused by alleged negligence, it is not necessary, to justify a verdict for more than nominal damages, that proof should be made as to how long the decedent would have been able to continue his earnings, or as to what part thereof was spent for the support of his family.

NEGLIGENCE CAUSING DEATH—INSTRUCTIONS.—If an instruction, in an action to recover damages for death caused by alleged negligence, limits the recovery to pecuniary damages, an objection that it does not enumerate the elements of allowable pecuniary damages is unavailing, if such a specific enumeration has not been requested.

NEGLIGENCE CAUSING DEATH—SURVIVAL OF ACTION.—A statute which provides that, whenever the death of a person shall be caused by the wrongful act or neglect of another, and the act or neglect is such as would have entitled the party injured to maintain an action and recover damages therefor if death had not ensued, then the person who would have been liable if death had not ensued shall be answerable to the personal representative of the deceased, for the exclusive use of the widow and next of kin, creates a right of action, but it does not vest a survival of the action in the intestate. The only relation it has with the rights of the deceased is, that its validity is to be tested by the inquiry as to whether the deceased could have maintained an action against the defendant for the injuries if he had survived them; if he could, death having ensued therefrom, his personal representative may maintain an action for the use of the widow and children.

John G. Williams, for the appellant.

Ayres, Jones & Hollett, for the appellee.

³³ **HADLEY, J.** Appellant was, by the circuit court of the United States for the district of Indiana, in 1896, appointed receiver of the Terre Haute & Indianapolis Railroad Company, and while he was operating the railroad of said company, as such receiver under the orders of the court, appel-

lee's intestate, while traveling on said railroad as a postal clerk, was killed in the state of Illinois by the alleged negligence of the defendant.

³⁷ Appellee brought this suit to recover damages for the death of her husband without first obtaining leave of said circuit court so to do. Appellant demurred to the complaint, for want of jurisdiction in the Marion superior court over the subject matter of the action. The demurrer was overruled. Answer by general denial, trial by jury, and verdict and judgment for plaintiff for five thousand dollars. The overruling of the demurrer to the complaint and appellant's motion for a new trial are the only errors assigned.

Whether appellant, acting as a receiver under appointment of the United States circuit court, can be sued in a state court without previous leave from the appointing court is the only question presented by the demurrer. We perceive no useful purpose to be attained by a review of the decisions as they existed prior to 1887. It is sufficient to state that the weight of authority held to the general rule that the possession of a receiver was inviolable, and that other courts could not acquire jurisdiction over the subject matter of the trust without specific authority so to do from the court appointing the receiver. But the application of the doctrine to railroads traversing more than one state, that were being operated by receivers, became productive of such great and manifold hardship to citizens who became claimants under the receiver as to demand a modification of the rule. To invest a receiver, who had assumed the role of a common carrier and who solicited and received business over long lines of railway, with the special privilege of requiring all persons injured by acts or transactions of his to seek redress in the court of his appointment, where they would be denied the right of trial by jury, and subjected to heavy expense, was found to be so oppressive and unreasonable that some of the federal courts, prior to 1887, entered general orders in such cases, granting claimants against the receiver authority to sue in the state courts in the county where the cause of action arose.

³⁸ In the case of *Dow v. Memphis etc. Ry. Co.*, 20 Fed. Rep. 260, 268, Caldwell, J., in stating reasons for such an order, said: "Where property is in the hands of a receiver simply as a custodian, or for sale or distribution, it is proper that all persons having claims against it, or upon the fund arising from its sale, should be required to assert them in the court appoint-

ing the receiver. But a very different question is presented where the court assumes the operation of a railroad hundreds of miles in length, and advertises itself to the world as a common carrier. This brings it into constant and extensive business relations with the public. Out of the thousands of contracts it enters into daily as a common carrier, some are broken, and property is damaged and destroyed, and passengers injured and killed by the negligent and tortious acts of its receiver and his agents. In a word, all the liabilities incident to the operation of a railroad are incurred by a court where it engages in that business; and, when they are incurred, why should the citizen be denied the right to establish the justice and amount of his demand by the verdict of a jury in a court of the county where the cause of action arose and the witnesses reside? If the road was operated by its owners or its creditors, the citizen would have this right, and when it is operated for their benefit by a receiver, why should the right be denied?"

Congress, taking cognizance of the evils and hardships flowing from the rapidly increasing railroad receiverships, in 1887 enacted a statute which provides as follows: "That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice": 25 U. S. Stats. 436.

³⁰ In the recent case of *Ray v. Peirce*, 81 Fed. Rep. 881, in an application to remove to the United States court a suit brought against his receiver in a state court, Baker, J., said concerning the conditions that led to the enactment of the above statute: "Such are the general principles of the law, uninfluenced by legislation applicable to receiverships. The consequences flowing from these principles of the law were found to be intolerably burdensome to persons having small claims and demands against the insolvent or against the receiver for his acts or transactions in his official capacity. To compel the claimant to prosecute a suit against the receiver of a railroad for a small demand in the court of his appointment, generally remote from the claimant's residence, involved such inconvenience and expense as to amount in many cases

to a practical denial of justice. Even an application to the court who appointed the receiver for leave to sue in another court nearer the residence of the claimant and his witnesses was found to be inconvenient and expensive, and frequently such applications were met with denial. With the multiplicity of railroad receiverships the evil became so intolerable that legislation was found necessary to secure relief: Act of March 3, 1887, sec. 3."

Appellant contends that the right conferred by this statute extends only to suits in other federal courts, and that "it confers no jurisdiction of any kind, or in any manner upon any other courts." We cannot yield our assent to this proposition. Little relief from the mischiefs sought to be remedied would be attained by this sort of construction, and we should not adopt it unless its provisions will admit of no other. It is the duty of a court, in construing a remedial statute, to give it that interpretation, if not inconsistent with its terms, that will promote and advance the remedy intended by the lawmakers. Section 2 of the same act provides that a receiver appointed by a federal court to manage or operate property in his possession shall do so in conformity to the valid laws of the state in which the property shall be situated, ⁴⁰ and in the same manner that the owner would be required to operate it if in possession; that is to say, it makes receivers of a federal court, operating a railroad and dealing with the general public as a common carrier, amenable to state laws in the same manner, and by the same rules of liability, that apply to rival corporations managing their own similar property. The two sections construed together clearly indicate that the object Congress had in view was to put receivers operating railroads under orders of federal courts upon the same footing as owners operating their property in the same territory, so far as concerns the legal liability of such receivers to the state and to the demands of citizens growing out of the operation of the railroad. The right to liquidate claims against such receivers before a competent and convenient tribunal is a reasonable grant, and in no sense incompatible with the receiver's possession or rights of the owners or creditors. Execution upon a judgment thus obtained is not contemplated by the statute, nor sought in this case, but the existence and extent of the claim, where thus judicially determined, is to be referred to the court in which the receiver was appointed for equitable settlement.

In at least two cases, the United States supreme court has declared the scope of the federal statute to embrace all courts of competent jurisdiction, and that it should not be restricted to federal courts. The case of *Texas etc. Ry. Co. v. Johnson*, 151 U. S. 81-101, was begun in a state court of Texas, against a receiver, without leave, and in course of the opinion the court, by the chief justice, said: "By section 3 of the act of March 3, 1887 (24 U. S. Stats. 552), as corrected by the act of August 13, 1888 (25 U. S. Stats. 433), every receiver appointed by a court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with the property, without the previous leave of the court by which such receiver was appointed. Necessarily, such suit may be brought in any court of competent jurisdiction and ⁴¹ proceed to judgment accordingly." The case of *McNulta v. Lockridge*, 141 U. S. 327, is to the same effect.

Other federal courts, so far as their decisions have come under our observation, have uniformly held that the legislation of 1887 applies alike to state and federal courts, following what they conceive to be the rule laid down by the United States supreme court in *McNulta v. Lockridge*, 141 U. S. 327, and *Texas etc. Ry. Co. v. Johnson*, 151 U. S. 81. See *Dillingham v. Hawk*, 23 U. S. App. 273; 60 Fed. Rep. 494; *Missouri etc. Ry. Co. v. Texas etc. Ry. Co.*, 41 Fed. Rep. 311-314; *Central etc. Co. v. St. Louis etc. Ry. Co.*, 40 Fed. Rep. 426; *Central etc. Co. v. East Tennessee etc. Ry. Co.*, 59 Fed. Rep. 523; *Eddy v. Lafayette*, 49 Fed. Rep. 807. The same construction has been given the act of 1887 by the supreme courts of Texas and Illinois: *McNulta v. Lockridge*, 137 Ill. 270-282, 31 Am. St. Rep. 362; *Dillingham v. Russell*, 73 Tex. 47-50, 15 Am. St. Rep. 753. We conclude, therefore, that appellee had the right to bring her action without first obtaining leave of the court in which appellant was appointed a receiver, and the right to proceed to final judgment and liquidation of her claim before the chosen tribunal, and that appellant's demurrer to the complaint for want of jurisdiction was properly overruled.

Appellant insists that the damages assessed by the jury are excessive. The action is based upon the statute of Illinois, generically known as Lord Campbell's act, that limits the recovery to the pecuniary loss of the widow and next of kin, not to exceed five thousand dollars. The evidence shows that appellee's decedent, at the time of his death, was fifty years of age, in good health, had been in the United States postal serv-

ice seventeen or eighteen years, receiving a salary of eleven hundred and fifty dollars per annum, left a widow, and their two sons, aged nineteen and fourteen respectively, as the next of kin; that his wife and children were dependent upon him for support, and that the ⁴² expectation of life of a man in good health at the age of fifty is twenty and ninety-one one-hundredths years.

We cannot agree with appellant that, for want of evidence as to the length of time the intestate would have been able to continue his earnings, and for failure to prove what part of his earnings was spent for the support of his wife and children, the jury should have awarded only nominal damages. It is the legal duty of a husband and father to support his wife and children; and, when the ability is shown, the law presumes that duty is discharged until overcome by evidence. "Where the relation of the party, whose death has been caused, to those for whose benefit the suit is being prosecuted has been shown, and his obligation, disposition, and ability to earn wages or conduct business, and care for, support, advise, and protect those dependent upon him, the matter is then to be submitted to the judgment and sense of the jury. The ultimate question of the amount resting within the province and sound discretion of the jury, their finding will never be disturbed where the court cannot say that improper motives have swayed them in ascertaining the amount returned": *Pittsburgh etc. Ry. Co. v. Burton*, 139 Ind. 357-378, and cases there cited. If the intestate's earnings had continued the same for ten years and he had bestowed but half the amount upon his family, their pecuniary loss would have amounted to the sum of recovery, and this without any estimate for the loss of parental training to which the sons were entitled. We cannot hold that the damages assessed are excessive.

The instruction given by the court, complained of, informed the jury that the measure of damages was the actual pecuniary loss shown by the evidence to have resulted to the widow and children, if any, by reason of the death of the husband and father; that they could not allow damages for any pain and suffering endured by the deceased, nor for funeral expenses, nor for any grief or sorrow on the part of the widow and children on account of the death of the deceased; ⁴³ but that the damages must be confined to the actual pecuniary loss sustained by the widow and children, not exceeding five thousand dollars; that if the evidence did not show any pecuniary loss to the

widow and children, if they found for the plaintiff, they should award only nominal damages; but if it did show such loss, that they should return such sum as will cover it, not exceeding the above limit. The objection urged to this instruction is that it is not sufficiently explicit in defining the damages to which the plaintiff was entitled. The instruction carefully limited the recovery to pecuniary damages, was clearly right so far as it went, and, if appellant had desired a specific enumeration of the elements of allowable pecuniary damages, he should have requested it. There was no available error in giving this instruction.

Appellant requested the giving of two instructions, which was refused by the court. The first request refused told the jury that there had been no evidence submitted tending to show for how long a time the deceased would probably have been able to earn the salary he was receiving at the time of his death, nor how much of that salary was expended for the personal use of the deceased, nor how much of it, if any, was expended for the support of his family, nor how much of his time the deceased spent with his family, nor what part he took in raising and educating his sons, and that, in making up their verdict, the jury must allow nothing for any of these things, and, if the evidence showed no loss outside these items, their verdict should be for nominal damages only. This instruction was clearly wrong for reasons given concerning the instruction given by the court.

The second instruction refused is as follows: "Before the plaintiff is entitled to recover in this action, the law requires her to show by the evidence that Richard T. Shimer had a cause of action against the defendant, which had accrued previous to, and existed at the time of, his death; and if the evidence that has been submitted to you fails to satisfy you that some time elapsed between the injuries which Shimer ⁴⁴ received, and his death resulting from these injuries, then your verdict should be for the defendant." This instruction was asked upon the theory that the action, if any, survived, and if death was instantaneous and no action vested in the deceased, then none could survive or accrue to his widow and next of kin, under the statute.

The statute of Illinois will not admit of the construction contended for. It provides that: "Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would have, if death had not ensued, entitled the party injured to maintain an action

and recover damages in respect thereof," then the person or corporation which would have been liable if death had not ensued, shall be liable to an action by the personal representative of the deceased, for the exclusive use of the widow and next of kin. The right of action given by this statute is created by the statute, and in no sense can it be regarded as a survival of the action vested in the intestate. The only relation it has with the rights of the deceased is that its validity is to be tested by the inquiry as to whether the deceased could have maintained an action against the defendant for the injuries if he had survived them; if he could, death having ensued therefrom, his personal representative may for the use of the widow and children: *Pittsburgh etc. Ry. Co. v. Hosea*, 152 Ind. 412. The second instruction was properly refused.

We find no error in the record. Judgment affirmed.

NEGLIGENCE CAUSING DEATH—CONSTRUCTION OF STATUTE.—A statute providing that "when the death of a person, not being a minor, is caused by the wrongful act or negligence of another, his heirs or personal representatives may maintain an action for damages against the person causing the death," authorizes but one action to be brought: *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248. A right of action conferred by statute upon an executor or administrator to recover for the death of his decedent caused by wrongful act, is but a continuation of the same cause of action which the deceased would have had if death had not ensued: *Garrick v. Florida etc. R. R. Co.*, 53 S. C. 448, 69 Am. St. Rep. 874.

NEGLIGENCE CAUSING DEATH—SURVIVAL OF ACTION.—Under the statute, in some of the states, if a person, injured by the negligence of another, survives but a moment, a cause of action survives: *Note to Mulchahey v. Washburn Car Wheel Co.*, 1 Am. St. Rep. 461.

NEGLIGENCE CAUSING DEATH—MEASURE OF DAMAGES. In an action to recover for a death caused by negligence, recovery may be had in "an amount equal to the present cash value of the decedent's life to his family dependent upon him, during his expectancy of life": *Alabama etc. R. R. Co. v. Jones*, 114 Ala. 519, 62 Am. St. Rep. 121. Compare the monographic note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 375-383, on the elements and measure of damages in actions for having caused the death of human beings.

When, After the Appointment of a Receiver, and without Obtaining Leave of the Court, Actions may be Prosecuted against Him, or against the Person for Whom such Receiver is Appointed.*

General Principles as to Suing or Interfering with Receivers.—No proposition of law is, perhaps, better settled than that a court cannot

*REFERENCE TO MONOGRAPHIC NOTES.

Liability of railroad corporations while road is in hands of trustees or receivers: 8 Am. St. Rep. 313-316.

Claims which take precedence over mortgages of railway and like property: 54 Am. St. Rep. 400-433.

The relation of receivers to pre-existing liens, and the remedies for their enforcement: 71 Am. St. Rep. 354-384.

interfere with the custody of property held by another court through a receiver: *Gay etc. Co. v. Brierfield etc. Iron Co.*, 94 Ala. 303, 33 Am. St. Rep. 122. The custody of a receiver is the custody of the court: *People v. Brooks*, 40 Mich. 333, 29 Am. Rep. 534; *Bell v. American Protective League*, 163 Mass. 558, 47 Am. St. Rep. 481. A receiver's possession will be protected by the court, not only against violence, but against suits at law, and it may, therefore, forbid any interference, by way of levy or seizure, with the property in the possession of the receiver: See monographic note to *American etc. Bank v. McGettigan*, 71 Am. St. Rep. 355, on the relation of receivers to pre-existing liens, and the remedies for their enforcement. A state court has no authority to issue process against property already in the hands of a receiver appointed by a federal court: *Louisville Trust Co. v. Cincinnati*, 76 Fed. Rep. 296; and it is a commonly accepted doctrine that, unless expressly authorized by statute, a suit cannot be brought against a receiver, touching the property rightfully in his charge, nor for any malfeasance as to the parties, or others, without the permission of the court which appointed him: *Porter v. Sabin*, 149 U. S. 473, 479; *Davis v. Gray*, 16 Wall. 203, 218; *Texas etc. Ry. Co. v. Cox*, 145 U. S. 593, 601; *Martin v. Atchison*, 2 Idaho, 590; *Wayne Pike Co. v. State*, 134 Ind. 672; *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400; *People v. Brooks*, 40 Mich. 333, 29 Am. Rep. 534; note to *Naglee v. Alexandria etc. Ry. Co.*, 5 Am. St. Rep. 316; *Glover v. Thayer*, 101 Ga. 824; *Jordan v. Wells*, 3 Woods, 527; *Keen v. Breckenridge*, 96 Ind. 69; *de Graffenried v. Brunswick etc. R. R. Co.*, 57 Ga. 22; *Klein v. Jewett*, 26 N. J. Eq. 474; *Melendy v. Barbour*, 78 Va. 544; *Scott v. Chambers*, 62 Mich. 532; *Burk v. Muskegon etc. Foundry Co.*, 98 Mich. 614; *Links v. Connecticut etc. Banking Co.*, 66 Conn. 277; *Brown v. Rauch*, 1 Wash. 497; *Spalding v. Commonwealth*, 88 Ky. 135; *Pierce v. Chism*, Ind. App., Dec. 1899; and the rule that a receiver cannot be sued without leave of the court which appointed him applies to suits against him on a money demand, or for damages, as well as to those the object of which is to recover property which he holds by order of that court: *Barton v. Barbour*, 104 U. S. 126. Thus, a suit against a receiver of a foreign corporation for damages will not be sustained without leave of the court which appointed the receiver: *Barton v. Barbour*, 3 McAr. 212, 36 Am. Rep. 104; affirmed in *Barton v. Barbour*, 104 U. S. 126. A person having a legal cause of action, sounding merely in tort, against a receiver, has, it is held, a right to pursue his redress by an action at law, but he cannot bring such an action without first obtaining permission from the court which appointed the receiver: *Palys v. Jewett*, 32 N. J. Eq. 302. Even where a corporation has wrongfully obtained the possession of property before the appointment of a receiver, the owner cannot, after it has passed into the receiver's possession, replevy the property in an action against the receiver without first obtaining leave of the court which appointed the receiver: *Matter of Jensen Co.*, 128 N. Y. 550, 553. If a receiver is in possession of real estate, an action of ejectment cannot be

brought without leave of the court: *Angel v. Smith*, 9 Ves. 335; and, if a receiver has custody of real estate, a sale of the property under an execution at law is illegal and void: *Wiswall v. Sampson*, 14 How. 52. A sale, under execution, of property in the custody of a receiver, though under a levy made prior to his appointment, is void, unless authorized by the court: *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400; *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 Am. St. Rep. 837.

Leave to Sue—Jurisdictional Fact.—It has even been held that leave to sue a receiver is a jurisdictional fact, that it cannot be waived by any action of the receiver, and that the question of jurisdiction may be raised at any time, either in the lower court or in the supreme court: *Brown v. Rauch*, 1 Wash. 497, 500; but, whether this is true or not, the liability of a receiver is "official" except where he is personally at fault: See extended notes to *Texas Pac. Ry. Co. v. Johnson*, 18 Am. St. Rep. 77; *Naglee v. Alexandria etc. Ry. Co.*, 5 Am. St. Rep. 315; and the court granting leave to sue retains its administrative power: *French v. Union Pac. Ry. Co.*, 92 Fed. Rep. 26. As said in *McNulta v. Lockridge*, 141 U. S. 327, 332: "Actions against the receiver are, in law, actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands." The effect of suing a receiver without leave of court is ordinarily to raise only a question of contempt; it does not affect the right involved in the suit: *Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347; *Waling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400; *Naumburg v. Hyatt*, 24 Fed. Rep. 898; *Thompson v. Scott*, 4 Dill. 508; nor does the appointment of a receiver of the property of a debtor abate personal actions pending against the debtor: *Wilder v. New Orleans*, 87 Fed. Rep. 843; *Toledo etc. Ry. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; neither is such appointment a bar to suits brought against a corporation before the bill for a receiver is filed: *Kittredge v. Osgood*, 161 Mass. 384.

While there is no doubt of the soundness of the broad proposition that a court cannot interfere with the custody of property held by another court, through a receiver, it is also undeniably true that the circumstances under which the receiver obtains possession of the property, the purpose of the action brought against him, and the effect of the statute permitting him to be sued without leave of court, where such a statute exists, must all be considered in making a proper application of the general rule. In fact, some courts hold that a failure to obtain leave of court to sue a receiver at law does not affect the question of jurisdiction; that the question is one of contempt, and not of jurisdiction; and that the ordinary jurisdiction of other courts, than the one appointing the receiver, is in no manner taken away or affected by the appointment of a receiver:

Mulcahey v. Strauss, 151 Ill. 70, 80; Tobias v. Tobias, 51 Ohio St. 519; Le Fevre v. Matthews, 39 N. Y. App. Div. 232; Chautauque County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; St. Joseph etc. R. R. Co. v. Smith, 19 Kan. 225; Lyman v. Central Vermont R. R. Co., 59 Vt. 167, 179; Allen v. Central R. R., 42 Iowa, 683; Kinney v. Crocker, 18 Wis. 74. As said in Mulcahey v. Strauss, 151 Ill. 70, 80: "While it is true that it is a contempt of the appointing court to make its receiver a party defendant to a suit without leave first obtained for that purpose, it does not necessarily follow that the court, in which the suit is brought, is without jurisdiction. The appointing court may protect its officer either by punishing the party bringing the suit for contempt, or by enjoining him from the prosecution of the suit. But the failure to obtain leave is no bar to the jurisdiction of the court in which the suit is brought. This is certainly true in all cases where there is no attempt to interfere with the actual possession of the property held by the receiver. A different doctrine seems to prevail in the federal courts." A requirement that leave of court must be had before a receiver can be sued is for the receiver's protection and, if waived by him, no advantage can be taken of the omission by anyone else: Tobias v. Tobias, 51 Ohio St. 519. A receiver who defends a suit brought against him without objecting that no leave to sue was granted waives the objection: Elkhart Car Works Co. v. Ellis, 113 Ind. 215.

In accordance with the view that procuring leave of court before suing a receiver is not a jurisdictional fact, it has been held that a receiver may, without leave of a federal court which appointed him having been granted, be sued in a state court to recover damages for injuries caused by the negligence of servants employed by him in operating a railroad in the state as receiver: Kinney v. Crocker, 18 Wis. 74; and that an action to recover certain taxes levied upon the property of a railroad company may be maintained against the company and its receiver, appointed by a circuit court of the United States: St. Joseph etc. R. R. Co. v. Smith, 19 Kan. 225. In this case, it was insisted that the state district court had no jurisdiction of an action against a receiver so appointed. It did not appear whether leave to sue the receiver had been granted or not, but the supreme court held that the district court did have jurisdiction, and that it properly rendered judgment against the receiver: St. Joseph etc. R. R. Co. v. Smith, 19 Kan. 225. So, in Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349, the court considered that the mere fact that the defendants were acting as receivers under the appointment of a court of chancery could not be recognized as a defense to a suit at law for a breach of any obligation or duty which was fairly and voluntarily assumed by them in matters of business conducted or carried on by them while acting as such receivers. The failure to obtain leave of court to bring an action against a receiver of a foreign corporation, appointed in another state, does not deprive the court in which suit is brought of jurisdiction, nor does it neces-

sarily require that the service of the summons shall be vacated, particularly if it appears that the receiver may be sued, without leave, under the express statutory law of the foreign state: *Le Fevre v. Matthews*, 39 N. Y. App. Div. 232.

Trespass—Conversion—Inapplicability of General Principles.—A receiver may, of course, be sued without leave of court, when he is a trespasser: *Hills v. Parker*, 111 Mass. 508, 15 Am. Rep. 63. If a demand against him does not involve the administration of the trust committed to him, but merely arises from his having taken unlawful possession of property not included in the trust, he may be sued personally, as for a trespass, without prior permission of the court: *Curran v. Craig*, 22 Fed. Rep. 101; *In re Young*, 7 Fed. Rep. 855; *Barton v. Barbour*, 104 U. S. 126, 134. But a receiver can never be treated as a trespasser for selling property in his possession pursuant to the order of the court by which he was appointed. Neither can the plaintiff who procured the appointment of such receiver become a trespasser by advising and aiding him to execute such order: *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400; and a receiver cannot be sued for a trespass which occurred before his appointment: *Decker v. Gardner*, 124 N. Y. 334. A receiver is not required to take property forcibly out of the possession of a stranger, or even of the defendant, without the express direction of the court. Hence, a court will not protect a receiver who attempts forcibly to take property from the possession of a stranger claiming title thereto, any further than the law will protect him where his authority to take possession of the property of which he is appointed receiver is not questioned: *Parker v. Browning*, 8 Paige, 388, 35 Am. Dec. 717. A receiver may be sued, without leave of court, for the conversion of property, as where, in making a sale of mortgaged property, he sells other property than that which is mortgaged. It is not a defense to say that he supposed he had authority to do so. He must see to it that he sells no property except that mortgaged: *Kenney v. Ranney*, 96 Mich. 617. A clerk of court who is appointed receiver of a minor's estate is answerable for any failure of duty respecting the estate, and it is not necessary to obtain leave of court before commencing an action for such failure: *Boothe v. Upchurch*, 110 N. C. 62. If railroad property is in the exclusive possession of a receiver, he may be sued, without leave of the court, which appointed him, for his negligence in constructing a crossing: *Roxbury v. Central Vt. R. R. Co.*, 60 Vt. 121. So, receivers running a railroad in Massachusetts, under an appointment of a court of chancery in another state, who act as common carriers, and who are there answerable as such to actions at law, may be sued as common carriers in Massachusetts: *Paige v. Smith*, 99 Mass. 395. In this case, Foster, J., said: "It is impossible for the courts of this commonwealth to accord to these defendants an exemption from the ordinary common-law liabilities of common carriers, more extensive than they are allowed in the state in which

they were appointed receivers, and in which the accident occurred. Under these circumstances, the ordinary rule for which the defendants contend, that receivers are amenable solely to the court by which they are appointed, is inapplicable": *Paige v. Smith*, 99 Mass. 395, 396. It has also been held that, when the court which appoints a receiver is in another state than the court out of which garnishee process issued, it is not necessary for the latter court to ask leave of the former before issuing such process, and that the receiver is amenable to such process, in the absence of statutory prohibition, where it does not tend to disturb his rights under the general orders of the appointing court: *Phelan v. Ganebin*, 5 Colo. 14, 18; though the general rule is, that property in the custody of the law is not subject to attachment or garnishment, and that, therefore, property in a receiver's hands is not subject to such process until after it has been distributed by the court: *Note to Irwin v. McKechnie*, 49 Am. St. Rep. 497; *Columbian Book Co. v. De Golyer*, 115 Mass. 67; *Taylor v. Gillean*, 23 Tex. 508; *Field v. Jones*, 11 Ga. 413, 417.

Deprivation of Trial by Jury.—It was argued, in *Barton v. Barbour*, 104 U. S. 126, 133, that, by leaving all questions relating to the liability of receivers in the hands of the court appointing them, persons having claims against the insolvent corporation, or the receiver, would be deprived of a trial by jury; and that this would deprive him of a constitutional right; but Mr. Justice Woods, in delivering the opinion of the court, said: "Those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity." But Mr. Justice Miller, in a vigorous and convincing dissenting opinion to this case, said: "I know of no principle or precedent whereby a court of law, having before it a plaintiff with a cause of action of which it has jurisdiction, and a defendant charged with an act also within the jurisdiction, is bound or is even at liberty to deny the plaintiff his lawful right to a trial because the defendant is a receiver appointed by some other court, and to leave the suitor to that court for remedy, where it is known that some of the most important guaranties of the trial to which he is entitled, and which are appropriate to the nature of his case, will be denied him. Whatever courts of equity may have done to protect their receivers, or the fund in their hands, it is no part of the duty of courts of law to deny to suitors properly before them the trial of their rights, which justice requires and the constitution and the law guarantee": *Barton v. Barbour*, 104 U. S. 126, 140. In support of his views the learned justice cited *Kinney v. Crocker*, 18 Wis. 74; *Sprague v. Smith*, 29 Vt. 421, 70 Am. Dec. 424; *Hills v. Parker*, 111 Mass. 508, 15 Am. Rep. 63; *Camp v. Barney*, 4 Hun, 373; *Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347.

Suing Parties Represented.—With respect to suing parties represented by the receiver, it has been held that no action can be maintained by a creditor against a bank, after its effects have been placed in the hands of receivers, particularly where such action is prohibited by statute: *Leathers v. Shipbuilders' Bank*, 40 Me. 386; that a corporation creditor cannot maintain a suit to reach assets for the payment of debts withheld from the company, when it affirmatively appears that its affairs are in the hands of a receiver, who is administering its effects: *First Nat. Bank v. Dovetail etc. Gear Co.*, 143 Ind. 534; that a judgment creditor will not, in general, be permitted to enforce his judgment by a sale of property in the hands of a receiver: *Mercantile Trust Co. v. Baltimore etc. R. R. Co.*, 79 Fed. Rep. 389; and that, where property is in the hands of a receiver, appointed by a federal court having jurisdiction to make the appointment, a state court has no jurisdiction of an action to foreclose a mortgage on such property, or to avoid, or to set aside, an alleged foreclosure and sale by the mortgagee under a power, irrespective of the question whether the lien which the receiver was appointed to enforce is prior or subsequent to that sought to be enforced in the state court: *Milwaukee etc. R. R. Co. v. Milwaukee etc. R. R. Co.*, 20 Wis. 165, 88 Am. Dec. 735. But some cases hold that leave of court is not necessary before bringing an action at law against the debtor whom the receiver represents. Thus, it has been decided that a corporation whose property is in the hands of a receiver may be sued: *Decker v. Gardner*, 124 N. Y. 334, 341; that the appointment of a receiver of a corporation does not prevent an action against it upon a promissory note executed before the receivership: *Allen v. Olympia Light etc. Co.*, 13 Wash. 307; that the fact that a receiver has been appointed in a suit brought to foreclose a mortgage against the lessee does not deprive the lessor of the right to obtain possession of the premises by a proceeding under the forcible entry and detainer act, even if the lessor was, without any necessity therefor, made a party to the foreclosure suit: *Woodward v. Winehill*, 14 Wash. 394, 399; that it is not essential, in an action for damages against a defendant corporation, which is in the hands of a receiver, that leave to sue should first be obtained by the court which appointed the receiver: *Allen v. Central R. R.*, 42 Iowa, 683, 688; that the owner of a locomotive engine may maintain replevin for it against the agent of a railroad corporation, whose property is in the hands of receivers, without obtaining leave of the court appointing the receivers, if the corporation has no interest in the engine, although it is used on the railroad: *Hills v. Parker*, 111 Mass. 508, 15 Am. Rep. 63; that a national banking association may be sued, though a receiver has been appointed, and is administering its concerns: *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383; that while the receiver of an insolvent national bank may interpose and become a party to a suit to enforce a claim against the bank, he is not a necessary party to

such a suit: *Denton v. Baker*, 79 Fed. Rep. 189; and that the appointment, by a state court, of a receiver for the property of an insolvent bank does not prevent a federal court from entertaining a suit to set aside conveyances to the bank, on the ground that they are void as against the grantor's judgment creditors: *Bacon v. Harris*, 62 Fed. Rep. 99. The appointment of a receiver, in an action for a divorce, to enforce a decree for alimony awarded to the wife does not require prior encumbrancers of property, which comes into the possession of the receiver, to resort to the court making the appointment, for relief, under their claims; and it has been held that leave of the court appointing the receiver in such an action is not essential to the enforcement of judgments, recovered before the appointment, by the sale of land situated in other counties: *Petaluma Sav. Bank v. Superior Court*, 111 Cal. 488. The principle which runs through the cases permitting the party represented by a receiver to be sued without leave of the court which appointed the receiver is, as we understand it, that the possession of the receiver does not defeat the jurisdiction of the court over the respective equities and rights of the parties, though it may affect the nature and extent of the remedy which can be granted; and that there is no valid reason against prosecuting a cause of action to final judgment for the sole purpose of fixing the rights of the parties. If the effect of an action is to oust the receiver, or if it even involves any physical disturbance of his possession, a different question would be presented: See *Allen v. Olympia Light etc. Co.*, 13 Wash. 307, 309; *Bacon v. Harris*, 62 Fed. Rep. 99; *Petaluma Sav. Bank v. Superior Court*, 111 Cal. 488; *Wyatt v. Ohio etc. R. R. Co.*, 19 Ill. App. 289, 290; and it may be remarked that the appointment of a receiver for a corporation does not destroy the existence of the company as a body corporate, nor its capacity of being sued: *Allen v. Olympia Light etc. Co.*, 13 Wash. 307, 309; *Wyatt v. Ohio etc. R. R. Co.*, 19 Ill. App. 289, 291. If a chancery suit in which a receiver was appointed is settled, and the receiver is discharged before a decree of foreclosure, the question as to whether a sale made would be void, if made while the receiver was in possession, cannot arise on an appeal from the decree of foreclosure, and the failure of the complainant to obtain leave to make the receiver a party defendant is not available, where the complainant proceeds with the foreclosure suit, as an objection to the entry of a foreclosure decree: *Mulcahey v. Strauss*, 151 Ill. 70, 82. So, where a suit for a divorce has been dismissed leaving a fund in the hands of a receiver undisposed of, and the fund is claimed by both parties, there is no reason why leave of court should be obtained before suit brought to have the matter of the right to the fund judicially determined: *Tobias v. Tobias*, 51 Ohio St. 519, 521.

Act of Congress—Judgment against Receiver.—An action may be sustained in a state court, against a receiver appointed by a federal court, without prior leave of the federal court having been obtained. Note to *American etc. Bank v. McGettigan*, 71 Am. St. Rep. 356;

Erb v. Popritz, 59 Kan. 264, 68 Am. St. Rep. 362; Gay v. Brierfield etc. Iron Co., 94 Ala. 303, 33 Am. St. Rep. 122; McNulta v. Lockridge, 137 Ill. 270, 31 Am. St. Rep. 362, 141 U. S. 327; Dillingham v. Russell, 73 Tex. 47, 15 Am. St. Rep. 753; Houston etc. Cent. Ry. Co. v. Crawford, 88 Tex. 277, 53 Am. St. Rep. 752; Fullerton v. Fordyce, 121 Mo. 1, 42 Am. St. Rep. 516; Grant v. Buckner, 172 U. S. 232, 238; Central Trust Co. v. East Tennessee etc. Ry. Co., 59 Fed. Rep. 523; Central Trust Co. v. St. Louis etc. Ry. Co., 40 Fed. Rep. 426; Hollifield v. Wrightsville etc. R. R. Co., 99 Ga. 365; Ball v. Mabry, 91 Ga. 781; Fordyce v. Dixon, 70 Tex. 694; Stoltz v. Milwaukee etc. R. R. Co., Wisconsin, Sept. 1899; Meyer v. Harris, 61 N. J. L. 83. But this is so because it is permitted by acts of Congress which provide: "That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice": See act of March 3, 1887, 24 U. S. Stats., c. 373, sec. 3, p. 552, and the act of August 13, 1888, 25 U. S. Stats., c. 866, sec. 3, p. 433. The provision quoted is the same in both statutes, and is commonly referred to as the act of March 3, 1887, which form of reference is hereinafter adopted in considering its provisions.

The act of March 3, 1887, authorizing receivers appointed by the courts of the United States to be sued without the previous leave of the courts in which they were appointed applies, upon its face, to any of the receiver's actions in connection with the property in his charge as receiver, and may be invoked in a state court where the complaint states a good cause of action for equitable relief: Stoltz v. Milwaukee etc. R. R. Co., Wisconsin, Sept. 1899; or where it is sought to hold a federal receiver answerable for injuries caused by his maintaining and keeping in repair a structure upon the lands of a railroad company, which is a nuisance to the party who sues: Meyer v. Harris, 61 N. J. L. 83, 102. It applies to any court of competent jurisdiction. In other words, under the act of Congress referred to, receivers appointed by the courts of the United States may now be sued, without leave, in any court, state or federal, having jurisdiction over the subject matter: Texas etc. Ry. Co. v. Johnson, 151 U. S. 81, 101; Gay etc. Co. v. Brierfield etc. Iron Co., 94 Ala. 303, 33 Am. St. Rep. 122; McNulta v. Lockridge, 137 Ill. 270, 31 Am. St. Rep. 362; affirmed in 141 U. S. 327; Dillingham v. Russell, 73 Tex. 47, 15 Am. St. Rep. 753; Central Trust Co. v. East Tennessee etc. Ry. Co., 59 Fed. Rep. 523; Dillingham v. Hawk, 60 Fed. Rep. 494; Central Trust Co. v. St. Louis etc. Ry. Co., 40 Fed. Rep. 426; and claimants may prosecute their demands against a receiver in the court of his appointment: Ray v. Peirce, 81 Fed. Rep. 881, 883. The statute referred to applies to a receiver appointed by

a territorial court for a corporation created by act of Congress: *Wheeler v. Smith*, 81 Fed. Rep. 319. It abrogates the old rule on the subject of suing receivers: *Central Trust Co. v. St. Louis etc. Ry. Co.*, 40 Fed. Rep. 426, 427; and the appointing court has no power to enjoin the bringing of such suits in any other than the federal courts: *Central Trust Co. v. East Tennessee etc. Ry. Co.*, 59 Fed. Rep. 523.

A counterclaim or setoff comes within the spirit of the act of March 3, 1887, which permits the receiver of a federal court to be sued without leave, and gives a defendant sued by such a receiver, in a state court, the right to plead a setoff against him in that court: *Grant v. Buckner*, 172 U. S. 232, 238; and, under such act, a suit may be maintained against a receiver for the acts of his predecessor without previous leave of the court appointing him. Thus, an action at law can be maintained in a state court against a receiver of a railway appointed by a federal chancery court, for the torts of the servants of his predecessor in the same receivership: *McNulta v. Lockridge*, 137 Ill. 270, 31 Am. St. Rep. 362; affirmed in 141 U. S. 327. The question whether a federal receiver can be held answerable for the acts of his predecessor in the same office is not a federal question, but a question of general law; though an adverse judgment of a state court upon such a receiver's claim of immunity from suit, without leave of the appointing court, would doubtless present a federal question. The receiver, however, is not protected by the statute referred to in making such a claim. The right conferred by the act to sue without prior leave of the court is not given to the defendant, but to the plaintiff, and the only question which can properly arise under the act, where it is sought to hold a federal receiver answerable for the acts of his predecessor in the same office, is, whether the receiver so sued could be held liable for the acts of a prior receiver. In such a case, Mr. Justice Brown, delivering the opinion of the court in *McNulta v. Lockridge*, 141 U. S. 327, 330, said: "The act does not deprive anyone of the right to sue, where such right previously existed, but gives such right in certain cases, and it was for the court to say whether the plaintiff's cause of action fell within the statute, or whether the defendant was entitled to the exemption given him by the general law." The appointment of a receiver by a federal court for property already charged with a mechanic's lien under a judgment rendered in a state court, does not withdraw the property from the jurisdiction of the state court, nor prevent a valid sale thereof under special execution issued by the state court: *Rogers etc. Hardware Co. v. Cleveland Bldg. Co.*, 137 Mo. 442, 53 Am. St. Rep. 494. Under the act of March 3, 1887, a federal receiver may be sued for a marine tort in another district, without leave of the court appointing him: *The St. Nicholas*, 49 Fed. Rep. 671, 676.

Under the act of Congress, referred to above, a federal receiver is subject to an action in a state court, without leave of the appointing court, to recover damages for the negligence of the receiver,

or of his employés or agents, whereby injury has resulted to the plaintiff's person or property: Fullerton v. Fordyce, 121 Mo. 1, 42 Am. St. Rep. 516; McNulta v. Lockridge, 137 Ill. 270, 31 Am. St. Rep. 362, affirmed in 141 U. S. 327; Fordyce v. Withers, 1 Tex. Civ. App. 540; Eddy v. Lafayette, 49 Fed. Rep. 807. The fact that a national court which appointed a receiver of a railway corporation had made an order requiring all persons having claims or demands against him to present the same to a special master on or before a day designated, and the failure to present the claims as required by such order, do not constitute a bar to the prosecution of an action in a state court against such receiver for personal injuries sustained by an employé, though the receiver has sold the property, and the sale has been confirmed, a conveyance made to the purchaser, and the proceeds of the sale disposed of under an order of the court: Erb v. Popritz, 59 Kan. 264, 68 Am. St. Rep. 362. After the liability of a railroad receiver for the torts of his servants in operating the road has been incurred, and, after his resignation has been accepted and his successor appointed, by the federal court of chancery which appointed him, an action at law may be maintained, in a state court, by the aggrieved party, against such successor in his representative capacity. McNulta v. Lockridge, 137 Ill. 270, 31 Am. St. Rep. 362, 141 U. S. 327. If a railroad in the hands of a receiver appointed by a circuit court of the United States is sold by order of that court, but possession is retained by the receiver, after the sale, under the order of such court, one who claims damages for injuries alleged to have been received while in the employment of the receiver, after the sale and its confirmation, but, before delivery of the property, may sue the receiver in a state court without the consent of the court which appointed him, and his claim is not affected by a failure to present it to the federal court. After the circuit court has discharged its receiver and turned over the property to the purchaser, its jurisdiction ceases, and the state court, though the suit was commenced prior to such delivery, has the power to proceed to adjudicate the rights of the parties, and to enforce its own judgment according to the laws of the state: Houston etc. Cent. Ry. Co. v. Crawford, 88 Tex. 277, 53 Am. St. Rep. 752. In Missouri, it is held that a suit in a state court, against federal railroad receivers, for injuries done to the plaintiff prior to the receivers' appointment, cannot be maintained, under the act of Congress now being considered, without the consent of the federal court; and that a judgment against the company, containing a direction that it be certified to the receivers to be satisfied out of any funds that may be liable to the same, cannot stand in the absence of a prior permission to sue the receiver: Smith v. St. Louis etc. Ry. Co., 151 Mo. 391; but this holding is squarely opposed to what is conceived, in Meyer v. Harris, 61 N. J. L. 83, 102, to be the doctrine announced in McNulta v. Lockridge, 141 U. S. 327. Compare Central Trust Co. v. East Tennessee etc. Ry. Co., 59 Fed. Rep. 523, cited *infra*, as to the right to enjoin a suit against a re-

ceiver upon a cause of action which originated before the receivership. A circuit court of the United States took jurisdiction of an action against a receiver or manager of property appointed by it before the passage of the act of March 3, 1887, though the injury sued for was inflicted before the passage of the act, and the suit was commenced, without leave of court, after the passage of the act: *Texas etc. Ry. Co. v. Cox*, 145 U. S. 593; and an action brought in a state court, after the passage of that act, against a federal receiver of a railway, without permission of the court making the appointment, to recover for the death of certain persons, alleged to have been caused by the receiver's negligence, prior to the passage of such act, was maintained in *McNulta v. Lockridge*, 141 U. S. 327, affirming 137 Ill. 270, 31 Am. St. Rep. 362.

Whenever a person desires to make a receiver a party defendant to an original bill, or to an action at law, leave for that purpose should be obtained from the court which appointed him, unless the case is one which falls clearly within the provisions of the act of Congress above mentioned: *Minot v. Mastin*, 95 Fed. Rep. 734, 737; *Foreman v. Central Trust Co.*, 71 Fed. Rep. 776. No court, even under that act, can interfere with the custody of property held by another court through a receiver, but it may establish, by its judgment, a debt against the receivership, which must be recognized by the court appointing the receiver, and is not open to revision by it, if the court rendering it had jurisdiction of the subject matter and of the parties: *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. Rep. 753; *Gay etc. Co. v. Brierfield etc. Iron Co.*, 94 Ala. 303, 33 Am. St. Rep. 122; *Reisner v. Gulf etc. Ry. Co.*, 89 Tex. 656, 59 Am. St. Rep. 84; *Stateler v. California Nat. Bank*, 77 Fed. Rep. 43, 53; *In re Tyler*, 149 U. S. 164; *Hollifield v. Wrightsville etc. R. R. Co.*, 99 Ga. 365; *Woerishoffer v. North River Construction Co.*, 99 N. Y. 398. The receiver of a corporation, appointed by a federal court, cannot, without leave of that court, be sued in a state court in an action the purpose of which is to take from his hands or control property belonging to the corporation or held by it under a claim of ownership at the time the receiver took possession: *Hollifield v. Wrightsville etc. R. R. Co.*, 99 Ga. 365; and an action of trespass cannot be maintained, in a state court, against a receiver appointed, pendente lite, by a federal court, merely for the purpose of foreclosing mortgages on the corporate property of a railway company: *Decker v. Gardner*, 124 N. Y. 334. An independent suit to foreclose a mortgage on property in the hands of a receiver cannot be maintained, under the act of 1887, even in the same court, except by leave of the court which appointed the receiver: *American Loan etc. Co. v. Central Vermont R. R. Co.*, 84 Fed. Rep. 917, 86 Fed. Rep. 390. The question of a receiver's right or authority to hold or manage property committed to his charge cannot be raised, under the act of Congress above mentioned, by a suit in a state court, without leave of the federal court which appointed him: *Hollifield v. Wrightsville etc. R. R. Co.*, 99 Ga. 365; and a federal receiver cannot, with-

out leave, be called upon in a state court to answer a suit instituted against him by a judgment creditor of another person for the purpose of subjecting to the payment of such judgment a sum alleged to be due from the receiver to such other person, for such a suit does not relate to "any act or transaction" of the receiver, in connection with the property committed to his care, for which he is answerable under the act referred to: *Glover v. Thayer*, 101 Ga. 824, 828. If a receiver is appointed by a federal court, in a suit where it has plenary jurisdiction of the subject matter, the court has jurisdiction of the res, and, through the receiver, may take possession of it without regard to whether all claimants are, or are not, before it as parties. If it authorizes the receiver to take possession, the remedy of a stranger to the proceedings, who claims title to a part of the property, is by intervention in the suit before the federal court. He cannot maintain trespass against the receiver, on the ground that he was not made a party to the suit, for the court's order, in such a case, is not void: *Steele v. Walker*, 115 Ala. 485, 67 Am. St. Rep. 62; *Southern Granite Co. v. Wadsworth*, 115 Ala. 570. The bringing of a suit, in a federal court, against a federal receiver, without leave, to establish a right to the property placed in his custody, adverse to the receiver's right, does not come either within the purpose or the terms of the act of Congress, and is, therefore, not maintainable: *J. I. Case Plow Works v. Finks*, 81 Fed. Rep. 529; and, where a federal receiver assumes charge of property, whether rightfully or not, under the order of the court appointing him, a third person, who claims to own a part of the property, cannot, under the act of Congress of March 3, 1887, maintain an action of detinue against the receiver to recover such part, without permission of the court which appointed the receiver: *Southern Granite Co. v. Wadsworth*, 115 Ala. 570. Property in a state, in the possession of a federal receiver, is not subject to seizure and levy under process, which issues from a court of such state, to enforce the collection of a tax assessed upon its owner under the state laws: *In re Tyler*, 149 U. S. 164. As it is only federal receivers who may be sued, without leave, under the act of Congress of March 3, 1887, there should be in the complaint, where a federal receiver is sued without leave, an allegation that he was appointed by a federal court, or the plaintiff will be met by the valid general objection that a receiver cannot be sued without leave of the court which appointed him. It will not be presumed that the receiver was appointed by a court of the United States, and such an averment in the complaint will avoid the objection that leave to sue was not first obtained: *Pelree v. Chism*, Ind. App., Dec. 1899; *Pelree v. Jones*, Ind. App., March, 1900. Garnishment proceedings are not suits against the receiver for "any act or transaction" of his within the meaning of the federal statute above named, and the appointing court may enjoin the bringing of such proceedings: *Central Trust Co. v. East Tennessee etc. Ry. Co.*, 59 Fed. Rep. 523, 528; *Reisner v. Gulf etc. Ry. Co.*, 89 Tex. 656, 59 Am. St. Rep.

84; but a debt due from receivers of a railway company, appointed by a federal court, may be garnished in a state court, where it is sought, not to reach the property of the railway company, but that of the defendant, namely, a debt due him from the receivers: *Irwin v. McKechnle*, 58 Minn. 145, 49 Am. St. Rep. 495.

A federal court, which has appointed a receiver, may enjoin suits against him on causes of action which originated before the receivership, as well as all other suits not arising from some "act or transaction" of the receiver in carrying on the business connected with the property in his charge: *Central Trust Co. v. East Tennessee etc. Ry. Co.*, 59 Fed. Rep. 523. See, also, *Smith v. St. Louis etc. Ry. Co.*, 151 Mo. 391, above cited, and compare *McNulta v. Lockridge*, 141 U. S. 327, and *Meyer v. Harris*, 61 N. J. L. 83, 102, as to suits against receivers upon causes of action which originated before the receivership. Receivers have a right, unaffected by the act of 1887, to remove from the state courts suits involving more than two thousand dollars: *Central Trust Co. v. East Tennessee etc. Ry. Co.*, 59 Fed. Rep. 523, but where a federal receiver has been sued in a state court, without leave of the court by which he was appointed, and the amount in controversy is two thousand dollars or less, he does not have a right, under such act, to have the cause removed to the court by which he was appointed, where his petition does not present a state of facts making the removal necessary to promote the ends of justice: *Ray v. Peirce*, 81 Fed. Rep. 881. An action brought, without leave of court, against a receiver appointed by a federal court, and other parties, who are citizens of the same state as the plaintiff, for the purpose of establishing a joint liability as to all of the defendants, is a suit arising under the laws and constitution of the United States. Hence, if it is brought originally in a state court, it may be removed to a federal court: *Landers v. Felton*, 73 Fed. Rep. 311.

It will be observed that the act of Congress above quoted provides that "such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." Under this provision a judgment rendered against a federal receiver by a state court, in an action at law, is conclusive as to the existence and amount of the plaintiff's claim, but the time and manner of its payment are to be controlled by the court which appointed the receiver, for the adjustment of equities between persons having claims on the property and effects in the hands of such receiver are under the control of the court having custody through its receiver, but this does not affect the jurisdiction of other courts to conclusively establish, by judgment, the existence and extent of a claim: *Dillingham v. Hawks*, 60 Fed. Rep. 494, 497; *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. Rep. 753. Compare *Missouri Pac. Ry. Co. v. Texas Pac. Ry. Co.*, 41 Fed. Rep. 311. If a federal receiver continues to reject a claim which has been reduced to judgment in a state court, the complainant may maintain an action at law against the receiver upon

the judgment: *Denton v. Baker*, 79 Fed. Rep. 189, 194. While a debt due from the receivers of a railway company, appointed by a federal court, may be garnished in a state court, no executory process can issue on the judgment rendered in the state court. The judgment can be satisfied only by an application to the court appointing the receiver for an order directing its payment in the due order of the settlement of the affairs of the railway company: *Irwin v. McKechnie*, 58 Minn. 145, 49 Am. St. Rep. 495. As a judgment against a receiver does not create any personal liability, it should be so entered as to be enforced only out of the funds of the person or company he represents, properly chargeable to him in the capacity of receiver. A judgment rendered against a receiver, individually, is erroneous, and no award of execution can be made. The judgment should be against him as receiver, and should be made payable out of the funds held by him in that capacity, in the due course of the administration of his receivership: *McNulta v. Ensich*, 134 Ill. 46, 55, 56.

Railroads.—The receiver of a railroad company having a line of road traversing more than one state, who is exercising the franchises of such company and operating its road under an appointment from a federal court, is, in his official capacity, amenable to the rules of liability applicable to the company when it is operating the road by virtue of the same franchises. Such a receiver is, therefore, answerable in his official character, for injuries resulting from the negligence of himself, or that of his agents or employes, while operating the road under his exclusive management, and he may, since the act of March 3, 1887, above quoted, so far as it concerns actions against receivers, be sued therefor in any court of competent jurisdiction, state or federal, without previous leave of the court which appointed him: *Fullerton v. Fordyce*, 121 Mo. 1, 42 Am. St. Rep. 516; *McNulta v. Lockridge*, 137 Ill. 270, 31 Am. St. Rep. 362, 141 U. S. 327; *Union Pac. Ry. Co. v. Smith*, 59 Kan. 80. See, also, the principal case, and extended note to *Naglee v. Alexandria etc. Ry. Co.*, 5 Am. St. Rep. 316. The plaintiff cannot, however, maintain such an action against the receiver, without the consent of the federal court, for injuries occurring to the plaintiff prior to the receiver's appointment: *Smith v. San Francisco Ry. Co.*, 151 Mo. 391; and leave will be refused, in such a case, if asked: *Finance Co. v. Charleston etc. R. R. Co.*, 46 Fed. Rep. 508. See, also, *Northern Pac. R. R. Co. v. Heflin*, 83 Fed. Rep. 93. A suit for personal injuries, sustained by an employe of a receiver, who is operating a railway, under appointment from a federal court, may be brought against the receiver in a county where the company has an office and an agent, without leave from the court which appointed the receiver: *Brown v. Gay*, 76 Tex. 444. Damages for injuries to persons or property while a railroad is in the hands of a receiver are a part of the operating expenses, payable out of the income, if there is any; but in the event of a deficiency to be paid out of the corpus: *Bartlett v. Cicero etc. Power Co.*, 177 Ill. 68, 69 Am. St. Rep.

206; *Cross v. Evans*, 86 Fed. Rep. 1; *Anderson v. Condict*, 93 Fed. Rep. 349; *Texas Pac. Ry. Co. v. Johnson*, 76 Tex. 421, 18 Am. St. Rep. 60; monographic note to *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. 425, on claims which take precedence over mortgages of railway and like property; *McNulta v. Lockridge*, 137 Ill. 270, 31 Am. St. Rep. 362; 141 U. S. 327. It is not our purpose, however, to enter into a discussion of the liability of a receiver, or of a railway company while the road is in the hands of a receiver, or of the liability of the company where the receiver has been discharged and the road returned to the company with betterments. In fact, the act of Congress of March 3, 1887, relating to suits against receivers has no bearing upon suits brought against the company alone: *Texas etc. Ry. Co. v. Gay*, 86 Tex. 571, 609.

LEFLER v. STATE.

[153 INDIANA, 82.]

FALSE PRETENSES — INDICTMENT — SUFFICIENCY.—

An indictment for the offense of obtaining money under false pretenses need not allege the false pretense charged to be such as would impose upon a man of ordinary caution, or such as could not be guarded against by ordinary care and prudence.

R. N. Elliott and Ira T. Trusler, for the appellant.

W. L. Taylor, attorney general, Merrill Moores, and George L. Gray, for the state.

⁸² MONKS, J. Appellant was indicted, tried, and convicted of the offense of obtaining money under false pretenses. The only error assigned is that the court erred in overruling the motion to quash the indictment. It is insisted by appellant that the false pretenses alleged were not such as a person of ordinary caution and prudence would credit, and for that reason the indictment was insufficient.

It is alleged that appellant "designedly, knowingly, falsely, and feloniously pretended and represented to the said Annie Kidwell that he, said John Lefler, was then and there a single man; that he was divorced from his wife; that there was then and there a judgment for alimony against him in the Rush circuit court of Rush county, Indiana; that there was then and there an unpaid balance of fifteen dollars on said judgment against him; that he wanted and needed said fifteen dollars

from said Annie Kidwell with which to pay off and liquidate said claim and judgment standing against him as aforesaid."

⁸³ The part of the statute upon which the indictment is based reads as follows: "Whoever, with intent to defraud another, designedly . . . by any false pretense obtains from any person any money, or the transfer of any bond, bill, receipt, promissory note, draft, or check, or thing of value . . . shall be imprisoned," etc.: Acts 1883, p. 126; Burns' Rev. Stats. 1894, sec. 2352; Horner's Rev. Stats. 1897, sec. 2204.

It was said in some of the earlier cases in this state that to support any indictment the false representations must be of such existing facts as would deceive a person of ordinary intelligence and prudence: *State v. Magee*, 11 Ind. 154; *Leobold v. State*, 33 Ind. 484; *Bonnell v. State*, 64 Ind. 498. But the later cases of *Shaffer v. State*, 100 Ind. 365, *Wagoner v. State*, 90 Ind. 504, and *Miller v. State*, 79 Ind. 198, hold that whether or not the false pretenses are such as are calculated to deceive a person of ordinary caution and prudence is not a question of law for the court, but a question of fact for the jury under all the circumstances. In *State v. Burnett*, 119 Ind. 392, however, it was again held, on a motion to quash the indictment, that the false representations must be of such a character that a man of common understanding is justified in relying upon them.

In England, and many of the states, the rule is that any pretense which deceives the person defrauded is sufficient to sustain an indictment, although it would not have deceived a person of ordinary prudence: 2 Russell on Crimes, 9th Am. ed., 619-700; Roscoe's Criminal Evidence, 7th Am. ed., 487, 488; 2 Bishop's Criminal Law, secs. 433-436; *Regina v. Woolley*, 1 Den. C. C. 559; 4 Cox C. C. 193; 3 Car. & K. 98; 2 East's Pleas of the Crown, 8, pp. 827-831; *Regina v. Jessop, Dears. & B.* 442; 7 Cox C. C. 399; *Regina v. Giles, Leigh & C.* 502; 10 Cox C. C. 44; *Johnson v. State*, 36 Ark. 242; *State v. Fooks*, 65 Iowa, 196, 452; *State v. Montgomery*, 56 Iowa, 195; *People v. Pray*, 1 Mich. N. P. 69; *State v. Williams*, 12 Mo. App. 415; *Colbert v. State*, 1 Tex. App. 314; *In re Greenough*, 31 Vt. 279-290; *Watson v. People*, 87 N. Y. 561, ⁸⁴ 41 Am. Rep. 397; *People v. Oyer & Terminer*, 83 N. Y. 436-449; *People v. Cole*, 65 Hun, 624; 20 N. Y. Supp. 505; *People v. Rice*, 128 N. Y. 649; *State v. Mills*, 17 Me. 211; *Smith v. State*, 55 Miss. 513; *Watson v. State*, 16 Lea, 604; *Bowen v. State*, 9 Baxt. 45, 40 Am. Rep. 71; *Commonwealth v. Henry*, 22 Pa. St. 253; *Thomas*

v. People, 113 Ill. 531; Cowen v. People, 14 Ill. 348; Bartlett v. State, 28 Ohio St. 669, 670.

In discussing this question an eminent author said: "But must the pretense be such as is calculated to mislead men of ordinary prudence? Some of the older cases lay down the doctrine that it must. But, in reason, and it is believed according to the better modern authorities, a pretense calculated to mislead a weak mind, if practiced on such a mind, is just as obnoxious to the law as one calculated to overcome a strong mind, practiced on the latter. . . . Practically, it is impossible to estimate a false pretense otherwise than by its effect. It is not an absolute thing, to be handled and weighed as so much material substance; it is a breath issuing from the mouth of a man, and no one can know what it will accomplish except as he sees what in fact it does. Of the millions of men on our earth, there is not one who would not be pronounced by the rest to hold some opinion, or to be influenced in some affair, in consequence of considerations not adapted to affect any mind of ordinary judgment and discretion. And no man of business is so wary as never to commit, in a single instance, a mistake such as any jury would say on their oath could not be done by a man of ordinary judgment and discretion. These things being so, plainly a court cannot, with due regard to the facts of human life, direct a jury to weigh a pretense, an argument, an inducement to action, in any other scale than that of its effect": 2 Bishop's Criminal Law, 7th ed., secs. 433, 436.

In *Regina v. Jessop*, 7 Cox C. C. 399, the defendant passed to another for change a bank note, saying that it was for five pounds, when it really was, as he knew, for only one pound, and received ⁵⁵ the change for a five pound note. He was held to have committed the offense, although the person to whom he passed the note could read. Lord Campbell, C. J., said: "We are all of the opinion that the conviction was right. In many cases a person giving change would not look at the note, but, being told it was a five pound note and asked for change, would believe the statement of the party offering the note and change it. Then if, giving faith to the false representation, the change is given, the money is obtained by false pretenses."

In *Young v. Regina*, 3 Term Rep. 98, Kenyon, C. J., in defining the offense, gave "ordinary caution" as an ingredient; but Ashurst, J., said: "The legislature saw that all men were not equally prudent, and this statute was passed to protect the weaker part of mankind"; and Buller, J., said: "The ingredients

of this offense are the obtaining money by false pretenses, and with an intent to defraud." In *Queen v. Wickham*, 10 Ad. & E. 34, Denham, C. J., said to counsel arguing that the fraud must be such as to impose on a man of ordinary caution: "I never could see why that should be. Suppose a man has just art enough to impose upon a very simple person, and defraud him, how is it to be determined whether the degree of fraud is such as shall amount to a misdemeanor? Who is to give the measure?" In *Regina v. Woolley*, 4 Cox C. C. 193, the pretense was by a secretary of an Odd Fellows lodge that a member owed it a certain sum, greater than the real debt, and thus got the excess for himself. Held, a legal false pretense. Alderson, B., said: "If a man represents as an existing fact that which is not an existing fact, and so gets your money, that is a false pretense; for instance, that a certain church had been built, and that there was a debt still due for the building, when there was no debt due, that would be a false pretense; yet the matter might easily be inquired into and ascertained. Or, take the common case: The prisoner says, 'I am sent by Mrs. T. for a pair of shoes.' Is not that a false pretense? Yet inquiry can be made, and ⁸⁶ after the thing has happened, usually is made, and the falsehood detected." Lord Campbell said: "It seems that the legislature meant to prevent such gross frauds as may easily be perpetrated, though an inquiry might easily be made." "I entirely agree with the observation of Lord Denman in *Regina v. Wickham*, 10 Ad. & E. 34," Earle, J., said: "It was once thought that the law was only for the protection of the strong and prudent. That notion has ceased to prevail." So, in *Regina v. Giles, Leigh & C.* 502, where the defendant pretended to have power to bring back the prosecutrix's husband over hedges and ditches, Earle, C. J., said: "The pretense of power, whether moral, physical, or supernatural, made with intent to obtain money is within the mischief of the law."

The great weight of the authorities and the better reason sustain the rule that it is not necessary that the pretense be such as will impose upon a man of ordinary caution, or as cannot be guarded against by ordinary care and prudence.

The object and purpose of the law is to protect not only the man of ordinary care and prudence, but also the weak and credulous against the strong, the ignorant, inexperienced, and unsuspecting against the experienced and unscrupulous: *McKee v. State*, 111 Ind. 378, 381; 16 Am. Law Reg., N. S.,

321-325. In *McKee v. State*, 111 Ind. 378, it was urged by the appellant that the representations were so unreasonable, and of such a character, as that no person exercising reasonable caution would be warranted in believing them; in response to which this court said: "The design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and sagacity enable them to protect themselves: *Smith v. State*, 55 Miss. 513; 17 Am. Law Reg., N. S., 525; 16 Am. Law Reg. 321-325."

An inexperienced person, a child, or a feeble old man, might be induced to part with his property by false pretenses so flimsy and absurd as not to influence a man of ordinary prudence, and the falsity of which would at once be apparent ⁸⁷ to a man of experience. Still, if the representations were such as to secure the credit of such a person, and deprive him of the possession of his property, no matter how absurd such representations may appear to a person of more experience and of greater sagacity, they would be such representations as are contemplated by the statute: *McKee v. State*, 111 Ind. 378; 16 Am. Law Reg., N. S., 321-325; *Bowen v. State*, 9 Baxt. 45, 40 Am. Rep. 75-80, and note; *People v. Cole*, 65 Hun, 624, 20 N. Y. Supp. 205. As was said by Dr. Wharton: "The simple and credulous are as much under the shelter of the law as are the astute. . . . That gross credulity is no defense is illustrated by the prosecutions sustained against conjurers and fortune tellers. Nothing but gross credulity could be imposed on by such pretenders; yet, on behalf of those thus imposed on, prosecutions have been sustained": 2 Wharton's Criminal Law, 10th ed., secs. 1188, 1192.

An indictment has been sustained when money was procured as a loan by a false pretense that the borrower owed a certain debt and required the money to make a payment thereof: 7 Am. & Eng. Ency. of Law, 753; *State v. Montgomery*, 56 Iowa, 195. When money or property is obtained on the faith of a false representation that the defendant is a single man, it has been held that an indictment will lie: 7 Am. & Eng. Ency. of Law, 748; 2 Russell on Crimes, 9th Am. ed., 646, 647; 2 Bishop's Criminal Law, secs. 422, 445; *Regina v. Jennison*, 9 Cox C. C. 158; *Leigh & C.* 157; 31 L. J. M. C. 146; 8 Jur., N. S., 442; 6 L. T., N. S., 256; 10 Week. Rep. 488.

So far as *Magee v. State*, 11 Ind. 154, *Leobold v. State*, 33 Ind. 484, *Jones v. State*, 50 Ind. 473, *Bonnell v. State*, 64 Ind. 498, *Miller v. State*, 79 Ind. 198, *Shaffer v. State*, 82 Ind. 221,

Wagoner *v.* State, 90 Ind. 504, Shaffer *v.* State, 100 Ind. 365, State *v.* Burnett, 119 Ind. 392, and any other cases in this state hold that, to come within the statute, the false pretense must be such that a man of ordinary caution^{ss} and prudence would give it credit, or that it could not be guarded against by ordinary care and prudence, they are overruled.

Judgment affirmed.

FALSE PRETENSES—VICTIMS.—The better rule seems to be that a defendant, in a prosecution for obtaining money, property, or credit, by false pretenses, is guilty if he knew that his false pretenses were relied upon in obtaining the money, property, or credit, without regard to the fact as to whether they were calculated to deceive a prudent person or not: See monographic note to Barton *v.* People, 25 Am. St. Rep. 382, on the crime of obtaining money or goods by false pretenses: Bowen *v.* State, 9 Baxt. 45, 40 Am. Rep. 71, and extended note thereto, discussing ordinary prudence of the deceived party as an element of false pretenses.

VALPARAISO *v.* HAGEN.

[158 INDIANA, 387.]

MUNICIPAL CORPORATIONS—RIGHT TO DISCHARGE SEWAGE INTO STREAM.—Every owner of land through which a stream of water flows is entitled to its reasonable use and enjoyment, including the right of drainage, though such drainage corrupts the waters of the stream and sends them on to the owner or the servient estates less pure than he received them; and a city, through which a stream of water flows, is a riparian proprietor, having a right to discharge city sewage into the stream, where no other reasonable method of disposing of it is available.

INJUNCTIVE RELIEF IS DENIED IN CASES OF DAMNUM ABSQUE INJURIA. Hence, as a city has a right to discharge its sewage into a natural watercourse extending through it, where there is no other natural or reasonably possible method of discharging the sewage, a court of equity will not enjoin such discharge, though the waters of the stream are polluted to the injury of lower riparian proprietors, where the city acts in conformity with the law governing it, and without negligence.

EMINENT DOMAIN—TAKING OF PROPERTY, WHAT IS NOT.—The discharge of city sewage into a stream, which, in flood-time, carries the sewer filth out upon the pasture of a lower riparian proprietor, whereby the grass is rendered worthless, and noxious odors are emitted, to the annoyance and harm of such proprietor and his family, is not such a taking of private property as must be preceded by just compensation.

MUNICIPAL CORPORATIONS—RIGHT OF TO NATURAL STREAMS.—A city's lawful authority to exercise the right of eminent domain in securing an outlet for its sewage into a stream does not permit it to seize upon the stream and its margins below the outlet to relieve consequential damages.

A. D. Bartholomew, for the appellant.

N. L. Agnew and D. E. Kelley, for the appellees.

³³⁷ HADLEY, J. Valparaiso is a city of eight thousand inhabitants. Salt creek is a natural watercourse flowing from south to north through the western part of the city; thence west and north to its confluence with the Calumet river. Its fall is fifteen feet per mile, and its minimum volume two hundred and twenty-seven cubic feet of water per minute. Within the city limits on the southwest is a low-lying marsh that naturally drains into Salt creek. The natural and only practicable drainage for all the territory within the city limits is Salt creek.

³³⁸ Prior to 1896 the city had constructed, according to law, a general and complete system of sewerage for the city at a cost of fifty thousand dollars, and two hundred closets and five hundred kitchens had been connected therewith; and the outfall from the entire system was into the marsh at the southwest, at a point about sixty-four rods from Salt creek. About forty-seven thousand gallons of sewage are being daily discharged into the marsh. The marsh is heavily overgrown with grass and other vegetation, but sewage in some form finds its way into Salt creek and pollutes its waters. Above the point of sewage contact there are three slaughter-houses that drain directly into Salt creek, and one rendering establishment and one gasworks drain into near-by tributaries. Nine-tenths of one per cent of the water in Salt creek, below the sewer discharge in time of low water, is sewage coming from the city, the slaughter-houses, and other polluting agencies above.

Appellant is threatening and has arranged for an extension of the outlet directly through the marsh of Salt creek. The plaintiffs, nineteen in number, are the owners and occupants of lower lands abutting on Salt creek at distances from two to ten miles from and below Valparaiso. The action is for an injunction precluding the city from discharging sewage into Salt creek. The complaint sets forth the several interests of the plaintiffs in the subject matter: That Salt creek, before the grievances mentioned, was a natural watercourse and a perpetually running stream of pure water flowing by and through the lands of the plaintiffs, and was used by them for domestic, agricultural, and dairy purposes; that defendant city has eight thousand inhabitants and is situated upon Salt creek at a point higher and up stream from the lands of the plaintiffs; that the

city had theretofore constructed and put into use a large and complicated system of sewers and had permitted five hundred houses and closets to be connected therewith; that the sewers were so constructed that they emptied all the sewage of the city into the marsh on the southwest, a short distance from Salt creek, and that the sewage, being discharged ³³⁹ in great quantities into the marsh, overflowed and ran into Salt creek, whereby the waters of the creek became polluted, filthy, and unwholesome, and the banks of the creek became lined and overflowed with sewage, slops, excremental filth, and garbage, and the lands of the plaintiffs contiguous thereto, and which were used for pasture, have been and are being overflowed by said substances, and the grass so befouled that the plaintiffs' stock will not eat it nor drink the water in the stream; that noxious odors arise from the stream and permeate the air for a half mile and injuriously affect the health and happiness of the plaintiffs and their families; that the city is threatening to and will accomplish an extension of the sewer through the marsh to Salt creek and there and thereby empty all the sewage of the city directly into Salt creek above the plaintiffs' lands, and there and thereby greatly increase the pollution of the water and render it unfit for any purpose, to the irreparable damage of the plaintiffs. Prayer, "that the city be enjoined forever from constructing said sewer outlet, or emptying the sewage of the city in the said stream or upon the said land at the place where it is now emptying, and from depositing the same into said creek at any point."

A demurrer to the complaint was overruled, and sustained to the second paragraph of answer. A trial was had upon the general issue, and finding and judgment perpetually enjoining the appellant from polluting or increasing the pollution of the waters of the creek by permitting its sewage to run into the waters of the stream.

Error is assigned upon the action of the court upon the demurrers, and upon the overruling of appellant's motion to modify the finding and for a new trial. But, as suggested by the appellant, each assignment raises but a single, and the same, question, and they will therefore be considered together. That question is: May a municipality, acting in conformity to the statutes, skillfully and without negligence or malice, pursuing the only natural and reasonably possible ³⁴⁰ line of drainage, be enjoined from discharging its sewage into a natural water-course and thereby polluting its waters to the injury of the lower riparian proprietors?

It is a familiar principle that injunctive relief will not be granted if there exists a complete remedy at law, and, if the case falls within the class of *damnum absque injuria*, the denial is equally imperative. It is equally well established that every owner of land, through which a stream of water flows, is entitled to the reasonable use and enjoyment of the stream. His right to do so is not an acquired property right, but a natural right appurtenant to his freehold, and is in common and equal with all others owning land upon the stream. He may dam it and divert it for mechanical purposes and fish ponds if he will return it to its channel before leaving his premises; he may use it for purposes of agriculture; his animals may take water from it at will; he may clear away the forests, plant crops, fertilize his field, feed his animals in lots, and permit the storm water from his fields and feed yards to flow by natural ways into the stream; or he may collect the surface water upon his premises, if all upon the watershed into ditches, covered or uncovered, and clean or unclean, may direct them into the stream, even though such drainage corrupts the waters of the stream and sends them on to the owners of the servient estates less pure than he received them. His enjoyment is according to his position, superior to those below him and inferior to those above him.

The right to improve and beautify property and to employ all the reasonable methods afforded by the estate and its appurtenances, to protect the health and promote the comfort and happiness of self and family, is inseparably connected with the right to own and control property; and, though its exercise may sometimes injuriously affect others, the law affords no remedy. In acquiring estates and in erecting homes along watercourses, notice must be taken of the conformation of the territory, the natural lines of ³⁴¹ drainage, that farms, cities, and villages may gather along its banks, and that the impurities incident to the trades, to agriculture, and population, that fall upon the surface, will find their way into the stream, and that the enjoyment of the stream is liable to be modified and abridged, if not altogether suspended, in many uses to which it might originally have been fitted, by those above in the exercise of their own equal rights.

A municipality in large sense is a riparian proprietor. Its officers stand for the corporation. They are empowered by the state to provide and enforce sanitary measures for the preservation of the health and welfare of the public. The cor-

poration has the same right to exist as an aggregation, and to enjoy its possessions, as a natural person. It may, under the law, establish public halls, libraries, and market places; and it may lay out parks and embellish them with flowers and fountains for the comfort and happiness of the corporate body. It may open and improve streets, construct gutters, sluices, and waterways, and, if storm water carries into these latter the multifarious filth and garbage incident to populous places and bears the same away by natural channels to the general water-course of the basin, the right of the municipality to permit it will not be doubted, even though the waters of the stream are thereby so polluted as to render them unfit for ordinary uses.

And wherein have the dwellers below ground of complaint? They have suffered only that which they should have reasonably expected and estimated in acquiring their property. The question is rooted in the natural law of self-preservation. And if cities are permitted to adulterate streams by allowing all accumulating surface impurities to flow into them by natural channels, we do not perceive why the underlying principle will not allow them to deepen these natural storm channels and transform them into covered sewers, nor why the right to protect the health and welfare of the public against one class of noxious matter should not ³⁴² be extended to all classes of equal virulence. And, while action must be taken with a cautious regard for the rights of those below, it has come to be a scientific fact, generally accepted, that the minimum of mischief resulting from closet contents may be attained by an early dispatch through the medium of flowing water, wherein solids are dissolved and chemical action for purification speedily takes place. But, however this may be, there is back of the question sovereign power, resting upon reasons satisfactory to the legislature, conferred upon cities to construct sewers and outlets, and, by necessary implication, authority to discharge the sewage into the usual and naturally adapted conduits. The grant of such powers imposes the duty to exercise them in all needful cases.

This record shows that appellant is a city of eight thousand inhabitants; that between the years 1891 and 1896 the proper authority projected and constructed a complete system of sewers at a cost of more than forty thousand dollars, adopting for the outlet of the system the line of natural drainage for the district. It further appears that all parts of the city were ultimately drained into Salt creek within the city limits. And

there is no pretense that there is any other possible outlet or practical means of disposing of sewage, or that the sewer was unskillfully or negligently constructed.

Hence, then, to forbid a discharge of sewage into Salt creek is to deny to the city the right to discharge it anywhere, and thus leave it without the ordinary means of sanitation. Surely it is not the law that a salutary statute, essential to the health and welfare of the public, may be thus nullified by exhibiting a damage to private right. The sewage must be dispatched or the city abandoned. The place adopted for the outpour is that provided by nature and cannot be had elsewhere. The facts present a case wherein the principle of the greatest good to the greatest number must be permitted to operate, and private interest yield to the public good, and if the erection has been skillfully performed, ³⁴³ and without negligence, as is shown to be the fact by the record, and in a way to do the least mischief, it must be held to be a lawful exercise of power that equity will not restrain: *Barnard v. Sherley*, 135 Ind. 547, 41 Am. St. Rep. 454; *Richmond v. Test*, 18 Ind. App. 482, 501; *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592.

That cities are not liable for consequential damages to private property resulting from the construction of streets, sewers, and other public improvements, when the work is skillfully executed and free from negligence, is no longer an open question in this state: *Terre Haute v. Hudnut*, 112 Ind. 542, and cases there cited; *Vincennes v. Richards*, 23 Ind. 381.

But appellees' counsel argues, on behalf of one of the appellees, that the waters of the stream in flood time carry the sewer filth out upon his pasture, whereby the grass is rendered worthless, and noxious odors are emitted, to the annoyance and harm of appellee and his family, and that this is a consequential damage, not to his natural rights in the stream, but to his acquired property rights; and that it is a taking of his private property for public use without compensation first being rendered. The lessening of the value of an estate by a destruction of the grass and the creation of some personal discomfort has only the same protection of the law that is accorded to other forms of injury to property by municipal improvements, and it has been uniformly held in this state that such consequential damage is not such a taking of private property as must be preceded by just compensation: *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Macy v. Indianapolis*, 17 Ind. 267; *Lafayette v. Spencer*, 14 Ind. 399; *Weis v. Madison*, 75

Ind. 241, 39 Am. Rep. 135; *Lafayette v. Bush*, 19 Ind. 326. See, also, *Commonwealth v. Alger*, 7 Cush. 53, 85.

It will not do to say that the stream, and appellees' land lying along the margins of Salt creek, should have been ³⁴⁴ condemned by the city, to the right to dispatch sewage along the stream, before proceeding to do so. According to the statement of appellant's counsel, the premises of appellees alleged to be affected are situate from two to ten miles by the stream from the corporate limits of the city; and, if the city is required to go so far to recompense sewage effect, "Where may it stop short of the sea?" Appellant had lawful authority to exercise the right of eminent domain in securing an outlet for its sewage, but no such authority exists as will permit it to seize upon the stream and its margins to relieve consequential damages: *Richmond v. Test*, 18 Ind. App. 482, 500, and authorities cited.

Furthermore, the construction of sewers and outlets is sanctioned by the law, and what the law grants will not constitute a nuisance per se, public or private. And, if the law is obeyed, no actionable wrong will result. In any instance, however, an action may arise from want of due care in construction or repairs. But it must be presumed that all ministerial officers will perform their official duty and cause no offense in their execution of the law: *Elkhart v. Wickwire*, 121 Ind. 331, 337. Hence, injunction will not lie to restrain the exercise of a power lawfully conferred, until the power has been abused to the injury of public or private right.

By the judgment appealed from, appellant is "permitted to extend its sewer system from its present outlet to Salt creek, but is perpetually enjoined and restrained from polluting or increasing the pollution of the waters of the creek." The judgment is anomalous in that it expressly authorizes appellant to construct the proposed extension through the marsh to Salt creek, but forbids forever the pollution of the waters of the stream. Ordinarily, the right to extend the active operating sewer to Salt creek would carry with it the right to discharge the sewage, usually and necessarily carried by it, into the stream, which implies pollution of its waters; but the express prohibition must be held to preclude ³⁴⁵ the emptying of any corrupting substance into the creek. Whether the judgment is intended to operate against the situation as it now exists, and against the voiding of sewage into the marsh, whence it escapes into Salt creek, or to conditions that may exist if and after ap-

pellant has extended the sewer to the creek, is not clear, but if it relates to future conditions, as we have seen, injunction will not lie; and if to present conditions, the facts averred in the complaint and established by the evidence do not warrant it.

The complaint fails to aver the absence of skill or the want of due care, or that some other outlet could more reasonably be had, or that some other reasonable method of disposing of the city sewage is available; and, for reasons stated, it is insufficient to entitle appellees to the relief prayed. The demurrer to the complaint should therefore have been sustained.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

INJUNCTION TO RESTRAIN DISCHARGE OF SEWAGE INTO STREAM.—An injunction will lie to restrain the pollution of the waters of a stream by emptying therein the sewage of a city, thereby rendering the waters unwholesome and unfit for use, and creating a private nuisance in the premises of a landowner over which the stream flows: *Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367. A city may be enjoined from maintaining sewers by which sewage is collected and then carried upon the plaintiff's land, whereby waters there used by him are polluted and the banks of a stream are covered by filthy and unwholesome sediment: *Chapman v. Rochester*, 110 N. Y. 273, 6 Am. St. Rep. 366. Compare note to *Chalkley v. Richmond*, 29 Am. St. Rep. 741, discussing the liability of a city for creating a nuisance to private property.

EMINENT DOMAIN.—THAT THE INTERESTS OF RIPARIAN PROPRIETORS IN A STREAM OF WATER may be appropriated to a public use, see *Cooper v. Williams*, 4 Ohio, 253, 22 Am. Dec. 745. Compare the note to *Sheehy v. Kansas City etc. Ry. Co.*, 4 Am. St. Rep. 401, which discusses the question of consequential damages in cases of eminent domain; and see the extended note to *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 610, showing that to deprive one of the ordinary beneficial use and enjoyment of his property is, in law, equivalent to the taking of it, and is as much a taking as though the property itself were actually taken.

PRESTON v. BOSWORTH.

[158 INDIANA, 458.]

CONDITION SUBSEQUENT—WAIVER.—A breach of a condition subsequent does not complete a forfeiture, for a breach may be waived and is not, therefore, self-operative to divest the grantee's title; but, if the breach is not waived, it may be made the occasion of re-entry and enforcement of forfeiture.

PLEADING TO ENFORCE BREACH OF CONDITION SUBSEQUENT.—A complaint must exhibit a complete right of action. Hence, in an action by a grantor to recover an estate claimed to have been forfeited by reason of the breach of a condition subsequent contained in the deed, the complaint is insufficient, if it fails to allege re-entry, or its equivalent, that re-entry was prevented and that possession was demanded and refused.

J. R. Thornburgh, M. A. Chipman, and D. H. Fernandes, for the appellants.

Howell D. Thompson and Finley H. Gray, for the appellee.

458 BAKER, J. Suit by appellee to recover an estate, claimed to have been forfeited by appellants by reason of the breach of a condition subsequent. Demurrer to complaint overruled. Trial and judgment for appellee. Motion for a new trial overruled.

The facts pleaded in the complaint are these: On May 19, 1892, appellee owned certain land in Madison county. On that day he executed to appellants a warranty deed of the land. His wife, who has since died, joined in the conveyance. The statutory form for a warranty deed was used. Following the description of the land, appears this condition: "This conveyance is made to the grantees to enable them to ⁴⁵⁹ open and operate a well thereon for medicinal water, gas, or oil; and, if said well shall be at any time abandoned, the title shall at once revert to and vest in the grantors as heretofore held by them; and, as long as said well shall be used, the grantors shall have the privilege of taking water therefrom for the use of himself and family, but not for using oil or gas therefrom." Appellants properly constructed a well to a proper depth, but failed to find medicinal water, gas, or oil. About September 1, 1892, appellants abandoned the well and land, gave up their intention to establish a well or to use the land, removed from this state, and have done nothing since toward improving the well or the land.

A breach of the condition subsequent is pleaded. But a breach does not complete a forfeiture. A breach may be waived,

and is not, therefore, self-operative to divest the grantee's title. If not waived, a breach may be made the occasion of re-entry and enforcement of forfeiture. A complaint must exhibit a complete right of action. For failure to allege re-entry, or its equivalent (that re-entry was prevented and that possession was demanded and refused), this complaint is deficient: *Schuff v. Ransom*, 79 Ind. 458; *Cory v. Cory*, 86 Ind. 567; *Ellis v. Elkhart etc. Co.*, 97 Ind. 247; *Elkhart etc. Co. v. Ellis*, 113 Ind. 215; *Manifold v. Jones*, 117 Ind. 212.

As a new trial cannot be had upon this complaint, it is unnecessary to consider the grounds of the motion.

Judgment reversed, with directions to sustain the demurrer to the complaint.

DEEDS—BREACH OF CONDITION SUBSEQUENT—EFFECT OF.—A grantee's title to land dependent upon a condition subsequent is not divested by a mere failure to perform such condition. Entry for condition broken, or some other equivalent proceeding, is required of the grantor to make good the forfeiture: *O'Brien v. Wagner*, 94 Mo. 93, 4 Am. St. Rep. 362; monographic note to *Cross v. Carson*, 44 Am. Dec. 754, on when, how, and at whose instance a deed may be avoided for breach of condition subsequent, as a grantor of an estate upon condition may waive a breach and forfeiture: *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75.

STATE v. PORTLAND NATURAL GAS & OIL COMPANY.

[153 INDIANA, 483.]

COMBINATION BETWEEN NATURAL GAS COMPANIES.

If two corporations, which have permission to supply natural gas to the people of a city, enter into an agreement with each other, fixing the price of gas to be charged to consumers, and stipulating that neither company will furnish gas to persons who are patrons of the other, such agreement is a restriction upon fair competition between the two companies, and creates, at least, a basis for a monopoly. It is, therefore, unlawful.

CORPORATIONS—FORFEITURE OF CHARTER FOR FAILURE TO DISCHARGE PUBLIC DUTY.—A public corporation, having the privilege of supplying a city with gas, impliedly agrees to carry out the purpose of its creation, and assumes obligations to the public which it must discharge. Hence, if it fails to discharge its corporate duties by an agreement detrimental to the public interests, such as one whereby it disables itself from furnishing gas to persons who are patrons of a competing company, such corporation offends against the law of its creation, forfeits any further right to exercise its franchise, and is subject to a judgment of ouster.

QUO WARRANTO AS A REMEDY FOR ABUSE OF CORPORATE POWERS.—An information in the nature of a quo war-

ranto is not only an appropriate means of testing the right to exercise corporate franchises, but is also a proper remedy for the abuse, by a corporation, of the powers with which it has been invested.

QUO WARRANTO AGAINST PUBLIC CORPORATION—JUDGMENT OF FORFEITURE.—In a quo warranto proceeding against a corporation engaged in furnishing natural gas to the inhabitants of a city, the court may, in the exercise of its discretion, upon proof that the defendant entered into an agreement with a competing company, fixing the price of gas to be charged to consumers, render a judgment declaring a forfeiture of the defendant's corporate franchise, or it may render a judgment of forfeiture or ouster only of the defendant's right to carry out the illegal agreement.

Frank H. Snyder and William H. Williamson, for the appellant.

John W. Headington, John F. La Follette, and J. J. M. La Follette, for the appellee.

⁴⁸³ JORDAN, C. J. This is a proceeding in quowarranto by the state of Indiana, on the relation of the prosecuting attorney of the twenty-sixth judicial circuit, to dissolve and seize the corporate franchises of appellee. The venue of the cause was changed from the Jay circuit court to the Randolph circuit court, in which court a demurrer was ⁴⁸⁴ sustained to the information for insufficiency of facts, and judgment was rendered in favor of appellee thereon. The state appeals and assigns error on the ruling of the court in sustaining the demurrer to the information.

The information alleges that the defendant is a corporation duly organized in December, 1886, under the laws of the state of Indiana relating to the incorporation of manufacturing and mining companies. The object of its organization is to conduct the business of mining oil and gas, and to furnish the same for fuel and illuminating purposes and for propelling machinery, etc. Its place of business or operation is stated to be at the city of Portland, in the state of Indiana. After its incorporation it obtained from said city permission to lay gaspipes along and under the public streets of that city for the purpose of supplying its inhabitants with gas for light and fuel, and it engaged in furnishing gas to them for such purposes. That the Citizens Natural Gas and Oil Company was also duly incorporated in February, 1889, under the same laws and for the same purposes as was defendant, and it also was granted the privilege by the city of Portland to lay its pipes in and along the streets of the city for the same purposes as was defendant,

and it engaged in supplying gas to the inhabitants of said city for fuel and light.

After alleging these facts, the information charges that the defendant, on the first day of September, 1891, "in violation of law and in the abuse of its corporate powers and in the exercise of privileges not conferred upon it by law," entered into a certain agreement or combination with said Citizens Gas and Oil Mining Company "to fix the rate of gas to be charged by them and each of them to the consumers in said city of Portland." It was further agreed by and between the defendant and said other mentioned company that "neither of said companies should or would attach the service pipes of any gas consumer in said city to its pipe lines ⁴⁸⁵ if, at the time, such customer or consumer was a patron of the other company."

It is further averred that the defendant has observed and complied with said agreement, and the price of gas has been fixed thereby, and it has at all times refused to sell or furnish gas to the inhabitants of said city at any other price than the one fixed by said agreement, and, in pursuance of said agreement and in order to prevent competition, it has refused, and still refuses, to supply divers inhabitants of the said city of Portland with gas who, as it is alleged, were consumers of gas from the pipe line of the said Citizens Gas and Oil Mining Company. It is further alleged that there is no other corporation, company, or person in said city engaged in supplying gas for light and fuel to its inhabitants.

The information is not a model pleading, and may, perhaps, be said to be open to the objection that in some respects it is uncertain, and in others states conclusions instead of facts. The question, however, presented for our decision is: Are the facts, as therein alleged, sufficient to entitle the state to demand that the appellee's corporate franchises shall be declared forfeited?

Reduced to a simple proposition, the gravamen upon which it bases its demand for a forfeiture of the defendant's corporate rights is that it has, by an agreement, illegally united with the Citizens Gas and Oil Mining Company, a competing company, under which agreement the price of gas to be charged consumers has been fixed, and has agreed with said company that neither would furnish gas to persons who were patrons of the other company. By this agreement, it appears that it was controlled and at all times refused to furnish its product to divers inhabitants of the city of Portland, simply because they were consum-

ers of gas from the lines of the Citizens Gas and Oil Mining Company.

The insistence of counsel for the state is that the defendant, under the facts charged in the information, is shown to have combined with the Citizens Gas and Oil Mining Company to fix and ⁴⁸⁶ maintain the price of gas, and that these companies agreed with each other not to furnish gas to consumers who were patrons of the other company, in order to prevent legitimate competition; that, in carrying out the compact or agreement, the defendant exercised powers not conferred by law, and committed an act violative of law, and is shown to have abused the rights conferred upon it by the state; and hence it ought to be ousted from longer or further exercising its corporate rights.

The code provides that an information may be filed against a corporation when it does, or omits, acts which amount to a surrender or forfeiture of its rights and privileges as a corporation, or when it exercises powers not conferred by law: Burns' Rev. Stats. 1894, sec. 1145; Rev. Stats. 1881, sec. 1131; Horner's Rev. Stats. 1897, sec. 1131, subd. 4. The statute exacts that the information "shall consist of a plain statement of the facts which constitute the grounds of the proceeding addressed to the court": Burns' Rev. Stats. 1894, sec. 1147; Rev. Stats. 1181, sec. 1131; Horner's Rev. Stats. 1897, sec. 1131.

The authorities assert, as a general rule, that courts will proceed with extreme caution in the forfeiture of corporate franchises, and a corporation will not be deprived thereof unless under express limitation, or for a plain abuse of its powers, whereby it fails to fulfill the design and purpose of its organization. When the state seeks to destroy the life of an incorporated body, it is required to show some grave misconduct, some act at least by which it has offended the law of its creation, or something material which tends to produce injury to the public, and not merely that which affects only private interests for which other adequate remedies are provided: High's Extraordinary Legal Remedies, secs. 649, 654; People v. North River etc. Co., 121 N. Y. 582, 18 Am. St. Rep. 843; State Bank v. State, 1 Blackf. 267, 12 Am. Dec. 234. Where, however, the facts disclose that a corporation has failed in the discharge of its corporate duties by uniting with others in carrying out an agreement, the performance of which is detrimental or injurious to the public, ⁴⁸⁷ it thereby may be said to offend against

the law of its creation, and consequently forfeits its right longer to exercise its franchise and is subject to a judgment of ouster: *People v. North River etc. Co.*, 54 Hun, 354; 121 N. Y. 582, 18 Am. St. Rep. 843; *State v. Oberlin Bldg. etc. Assn.*, 35 Ohio St. 258; *State v. Cincinnati etc. Ry. Co.*, 47 Ohio St. 130; *State v. Standard Oil Co.*, 49 Ohio St. 137, 34 Am. St. Rep. 541; High's Extraordinary Legal Remedies, sec. 666.

Courts have enlarged the rule so that an information in the nature of a quo warranto is now regarded not only as appropriate means of testing the right to exercise corporate franchises, but such proceedings are also a proper remedy for the abuse by a corporation of the powers with which it has been invested: *Beach on Private Corporations*, sec. 53. Of course, as asserted by the authorities previously cited, proceedings in quo warranto will not be countenanced or receive the sanction of a court, as a general rule, where the act complained of is of a trivial character or where the abuse charged may be said to be a doubtful one, or there exists any other adequate or ample remedy therefor: *Beach on Private Corporations*, sec. 436.

Corporations are recognized as creatures of the law and they certainly owe obedience thereto, and when they fail to perform duties which they were created to discharge, and in which the public have an interest, or where they do unauthorized or forbidden acts, the state unquestionably has the right, and it is its duty, to object, and it may interpose by information, and wrest from the offending corporation its franchises: *Beach on Private Corporations*, secs. 840, 841; *Cook on Stock and Stockholders*, sec. 635; *People v. Dashaway Assn.*, 84 Cal. 114.

Appellee is in its nature a public corporation, which fact has been recognized by our legislature in conferring upon companies engaged in a business of like character the right of eminent domain: *Acts 1889*, p. 22; *Burns' Rev. Stats. 1894*, sec. 5103. Being the creature of the law, the franchises granted to it by the state, in theory at least, were granted as a public ⁴⁸⁸ benefit, and in accepting its rights, under the laws of the state, it impliedly agreed to carry out the purpose or object of its creation, and assumed obligations to the public; and such obligations it is required to discharge: *Beach on Monopolies and Industrial Trusts*, sec. 221; *Thomas v. Railroad Co.*, 101 U. S. 71.

It certainly can be said, and the proposition is sustained by ample authority, that, in furtherance of the purposes for which it was created, it owed a duty to the public. Its duty toward the citizens of the city of Portland and their duty toward it

may be said to be somewhat reciprocal, and any dealings, rules, or regulations between it and them which do not secure the just rights of both parties cannot receive the approbation of a court. The law, among other things, exacted of appellee the duty to offer and supply gas impartially so far as it had the ability or capacity to do so, to all persons desiring its use within the territory to which its business was confined, provided always such persons made the necessary arrangements to receive it and complied with the company's reasonable regulations and conditions: *Portland Natural Gas etc. Co. v. State*, 135 Ind. 54, and authorities there cited; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319; *Chicago etc. Co. v. People's etc. Co.*, 121 Ill. 530, 2 Am. St. Rep. 124; *Westfield Gas etc. Co. v. Mendenhall*, 142 Ind. 538; *Central Union Tel. Co. v. Bradbury*, 106 Ind. 1; *Central Union Tel. Co. v. Falley*, 118 Ind. 194, 10 Am. St. Rep. 114; *Central Union Tel. Co. v. Swoveland*, 14 Ind. App. 341; 8 Am. & Eng. Ency. of Law, 614.

It is an old and familiar maxim that, "Competition is the life of trade," and whatever act destroys competition, or even relaxes it, upon the part of those who sustain relations to the public, is regarded by the law as injurious to public interests and is therefore deemed to be unlawful, on the grounds of public policy: *Greenhood on Public Policy*, 654, 655; *Chicago etc. Co. v. People's etc. Co.*, 121 Ill. 530, 2 Am. St. Rep. 124; *Gibbs v. Consolidated etc. Co.*, 130 U. S. 396; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560, 51 Am. St. Rep. 193; *Beach on Private Corporations*, secs. 54, 55.

The authorities affirm, as a general rule, that if the act complained of, by its results, will restrict or stifle competition, the law will regard such act as incompatible with public policy, without any proof of evil intent on the part of the actor or actual injury to the public. The inquiry is not as to the degree of injury inflicted upon the public; it is sufficient to know that the inevitable tendency of the act is injurious to the public: *Central Ohio etc. Co. v. Guthrie*, 35 Ohio St. 666; *Swan v. Chorpennig*, 20 Cal. 182; *State v. Standard Oil Co.*, 49 Ohio St. 137, 34 Am. St. Rep. 541; *Gibbs v. Smith*, 115 Mass. 592; *Richardson v. Buhl*, 77 Mich. 632; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102; *Beach on Monopolies and Industrial Trusts*, sec. 82.

Recognizing and adopting the principles to which we have referred as sound law, we next proceed to apply them as a test

to the facts involved in this case. It will not be unreasonable to presume that one of the objects upon the part of the city of Portland in granting permission to the Citizens Gas and Oil Mining Company to lay its pipes and mains along and under the streets of that city, after it had awarded the same rights to appellee, was that there might be a reasonable and fair competition between these two companies. By the agreement in question, when carried into effect, the patrons of one company were excluded from being supplied with gas from the other company. Each company was, by the terms of the agreement, bound to abide by and maintain the prices fixed, and each was prohibited from furnishing gas to the customers of the other.

That the people of that city who desired to become consumers of gas were, by the agreement in question, deprived of the benefits that might result to them from competition between the two companies certainly cannot be successfully denied. The exclusion of competition, under the agreement, redounded solely to the benefit of appellee and the ⁴⁹⁰ other company, and the enforcement of the compact between them could be nothing less than detrimental to the public. By uniting in this agreement appellee disabled, or at least professed to have disabled, itself from the performance of its implied duties to furnish gas impartially to all, and thereby made public accommodations subservient to its own private interests.

The agreement in controversy, as it is disclosed by the facts averred in the information, evidently could serve, so far as the public was concerned, no other purpose than a restriction upon competition, and created at least a basis for a monopoly. The law, as we have seen, is inimical to monopolies, and recognizes the right of the public to have the benefit of a fair and healthy competition, and requires that equal facilities and reasonable rates, in carrying out the purposes of such business as that in which appellee is engaged, so far as practicable, be secured to all.

In *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560, 51 Am. St. Rep. 193, we said: "The law has always been hostile to the creation of monopolies when they tend to impair the interest of the public. It is elementary that whatever is injurious to or against the public good is void on the ground of public policy. This policy unquestionably favors competition in trade to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies which tend to advance prices to the injury of the public in general."

In the appeal of *Thomas v. Railroad Co.*, 101 U. S. 71, Miller, J., speaking as the organ of the court, said: "Where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden ⁴⁹¹ which it imposes, is a violation of the contract with the state, and is void as against public policy."

While appellee, by the agreement in controversy, cannot be said to have fully renounced autonomy, still it did so to the extent, at least, that it thereby disabled itself from supplying persons with gas who were patrons of the other company. That, by entering into this agreement and carrying it into execution, appellee violated the principles of public policy, and clearly abused the rights and powers conferred upon it by the state, and may be said to have offended against the law of its creation, there can be no question. Such an illegal act or agreement upon the part of a corporation like appellee cannot be permitted to override the law, and it was the manifest duty of the state to interpose, as it has done, and call it to account; and, if the charge made is established, a deserving penalty ought to be inflicted.

In addition to the prayer for the forfeiture of appellee's rights as a corporation, the information asks that such other relief be granted as is just and proper. The rule is well settled that a court in cases in quo warranto proceedings like this, if the facts justify, may, in the exercise of its discretion, render a judgment against defendant declaring a forfeiture of its corporate franchises, or the judgment may be a forfeiture or ouster only of the right of the defendant to carry out or continue the illegal act or acts charged and established: *State v. Standard Oil Co.*, 49 Ohio St. 137, 34 Am. St. Rep. 541; *Cook on Stock and Stockholders*, sec. 635.

From what we have said it follows that the court erred in sustaining appellee's demurrer to the information, and the judgment is therefore reversed and the cause remanded with instructions to the trial court for further proceedings consistent with this opinion.

MONOPOLIES—INVALIDITY OF—PUBLIC DUTY.—Whatever tends to create a monopoly, and to prevent competition between those engaged in a public employment, or business impressed with a public character, is opposed to public policy, and therefore unlawful: *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319. Compare *State v. Standard Oil Co.*, 49 Ohio St. 137, 34 Am. St. Rep. 541; *Distilling etc. Feeding Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200. The business of making and distributing illuminating gas for the use of a city is a business of a public character, and corporations engaged in such business owe a duty to the public; and any unreasonable restraint upon the performance of such duty is prejudicial to the public interest, in contravention of public policy, and void: *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319.

QUO WARRANTO — CORPORATIONS — MONOPOLIES — OUSTER.—If a corporation misuses, abuses, and usurps the powers granted by its charter in creating a monopoly, or otherwise, it may be ousted from its franchises by a judgment in quo warranto proceedings: *Distilling etc. Feeding Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200; *State v. Standard Oil Co.*, 49 Ohio St. 137, 34 Am. St. Rep. 541. Compare monographic note to *State v. Atchison etc. R. R. Co.*, 8 Am. St. Rep. 179-202, on the forfeiture of corporate franchises.

COLIP v. STATE.

[158 INDIANA, 584.]

LARCENY—EMBEZZLEMENT—"ACCESS TO, CONTROL, OR POSSESSION OF PROPERTY."—A farmhand, who breaks open a box of wheat belonging to his employer, during the latter's absence and without his knowledge or consent, and removes and sells the wheat, it not being specially intrusted to him for any purpose, is guilty of larceny and not of embezzlement. Such felonious appropriation does not fall within the provisions of a statute which provides that, if an employé, having "access to, control, or possession of property" belonging to his employer, appropriates such property to his own use, he shall be deemed guilty of embezzlement because something more than mere physical access, or opportunity of approach to the thing, is required. There must be a relation of special trust in regard to the article appropriated, and it must be by virtue of such trust that the employé has "access to, control, or possession" of it.

CRIMINAL LAW—INDETERMINATE SENTENCE ACT.—Under a statute which requires the jury, in a case of felony, to find and state whether or not the defendant is over sixteen years of age, and less than thirty years of age, it is not necessary to find his exact age. A verdict that he is guilty, and a finding that he is over sixteen years of age, and under thirty years of age, complies with the statute.

NEW TRIAL—INDETERMINATE SENTENCE ACT—NO EVIDENCE AS TO AGE OF DEFENDANT.—The age of a defendant, in a prosecution for larceny, has nothing to do with the question of his guilt or innocence. It is important only with reference to the place of his confinement, during the term of his imprisonment, where persons between certain ages are deemed, under the

statute, proper subjects for a reformatory. Hence, a new trial will not be granted because there was no evidence as to the age of the defendant, although the jury found that he was over sixteen and under thirty years of age.

LARCENY—SUFFICIENCY OF VERDICT.—A verdict that a defendant, charged in an information with petit larceny, is “guilty as charged in the indictment,” is equivalent to a finding that he is guilty of petit larceny. The misnomer of the information is a mere irregularity, by which the accused is not prejudiced.

LARCENY — VALIDITY OF JUDGMENT — INDETERMINATE SENTENCE ACT—CONSTRUCTION OF STATUTES.—That portion of the Indiana statute making a fine, not exceeding five hundred dollars, a part of the penalty for petit larceny, was not repealed by the Indiana indeterminate sentence act of 1897. Hence, a judgment upon a conviction for petit larceny is not erroneous because it includes a fine of one dollar, as well as the imprisonment provided for in the indeterminate sentence law.

S. D. Stuart and C. G. Reagan, for the appellant.

William L. Taylor, attorney general, C. C. Hadley, Merrill Moores, and John E. Garver, for the state.

585 DOWLING, J. Information founded upon an affidavit charging appellant with the crime of petit larceny. Trial by jury. Verdict of guilty. Motion for a new trial overruled, and judgment on verdict that appellant be committed to the care and custody of the board of managers of the Indiana Reformatory, etc., that the state of Indiana recover from the appellant the sum of one dollar as a fine, and that he pay all costs, etc.

The only error discussed on this appeal is the ruling of the court on the motion for a new trial. It is insisted that the verdict and judgment, respectively, are “contrary to law” and “contrary to the evidence.”

The first point made is that the appellant, if guilty at all, was guilty of the crime of embezzlement, and not of larceny. The evidence shows that he boarded and lodged at the residence of the prosecuting witness on a farm, and that occasionally he did small jobs of work for said witness, such as feeding and caring for livestock, building fences, hauling **586** manure, and the like. During the temporary absence from home of the prosecuting witness, appellant, who remained on the farm with the family of the prosecuting witness, without the knowledge or consent of the prosecuting witness, or of any of his family, broke open a large box containing a lot of wheat belonging to the prosecuting witness, and removed some twelve bushels therefrom, which he hauled away and sold. Afterward, when charged with taking the wheat, he denied it.

Counsel for appellant contend that the appellant was the servant or employé of the prosecuting witness, that, as such servant or employé, he had access to the wheat, and that his felonious appropriation of the same fell within the provisions of section 2022 of Burns' Revised Statutes of 1894, defining the crime of embezzlement, the substance of which may be thus stated: Every servant or employé of any person, who, having access to, control, or possession of, any article or thing of value to the possession of which his employer is entitled, shall, while in such employment, take, purloin, secrete, or in any way whatever appropriate to his own use any property or thing of value belonging to, or held by, such person, in whose employment said servant or employé may be, shall be deemed guilty of embezzlement, and, upon conviction thereof, shall be imprisoned, etc.

The access to, control, or possession of property of the servant or employé intended by the statute is such access to, control, or possession as arises from the nature of the employment with reference to the particular article of property feloniously appropriated. Something more than mere physical access, or opportunity of approach to the thing, is required. There must be a relation of special trust in regard to the article appropriated, and it must be by virtue of such trust that the servant has access to, or control, or possession of it. No such relation of trust exists between a farmhand and his employer with reference to the master's wheat or other farm products with which the servant is not intrusted ⁵⁸⁷ for the purpose of safekeeping, carriage, delivery, or sale. If such a servant feloniously purloins, secretes, or otherwise appropriates the property of the master, such taking is larceny, and not embezzlement.

Even where the servant has the care and oversight of property belonging to the master, the felonious appropriation of it by the servant is larceny. The law in such cases is thus stated by an eminent author: "If a servant, who has merely the care and oversight of the goods of his master—as the butler of plate, a messenger or runner of money or goods, a hostler of horses, the shepherd of sheep, and the like—convert such goods to his own use, without his master's consent, this is a larceny at common law; because the goods, at the time they are taken, are deemed in law to be in the possession of the master, the possession of the servant in such a case being the possession of the master. Thus where A, going on a journey, left his shop in the care of the defendant under the superintendence of A's

brother, and the latter, on account of the defendant's drunkenness, dismissed him, and A, on returning, found his goods missing, and, pursuing the defendant, overtook him with some of them in his possession, the court sustained a conviction. . . . The rule may be amplified by saying that where one having only the care, charge, or custody of property for the owner converts it *animo furandi*, it is larceny. . . . A clerk taking money or goods from his employer's safe, till, or shelves is guilty of larceny, unless it appear that he is specially authorized to dispose of such money or goods at his discretion": Wharton's Criminal Law, 8th ed., secs. 956, 957, 960.

It is said by the same author that, "Embezzlement is an intentional and fraudulent appropriation of the goods of another by a person intrusted with the property of the same. In the common-law definition of larceny, we must remember, there are two gaps through which, in the expansion of business, ⁵⁸⁸ many criminals escaped. The first of these gaps is caused by the position that to maintain larceny it is necessary that the stolen goods should have been at some time in the prosecutor's possession. The second results from the assumption that when possession of goods is acquired *bona fide* by a bailee, no subsequent fraudulent conversion (unless there be breaking of bulk or some other rupture of the conditions of bailment) can be larceny while the bailment lasts. To cure these defects were passed the embezzlement statutes of England, and of most of the United States. These statutes were intended simply to establish two new cases of larceny. If a servant (and this is the first of the two) steals his master's goods before they have come into his master's possession, he, the servant, shall be guilty of larceny. And the second is, that it shall be larceny for a trustee or bailee to fraudulently convert to his own use his master's goods he may have *bona fide* received. Now, as neither of these cases is larceny at common law, the statutes of embezzlement in no way overlap the old domain of larceny. They were passed solely and exclusively to provide for cases which larceny at common law did not include. Hence, nothing that is larceny at common law is larceny under the embezzlement statutes; and nothing that is larceny under the embezzlement statutes is larceny at common law": Wharton's Criminal Law, 8th ed., sec. 1009; see, also, secs. 1905, 1924; Bishop on Criminal Law, 4th ed., secs. 326-370; *Marcus v. State*, 26 Ind. 101; *Smith v. State*, 28 Ind. 321. Under these author-

ities, it seems clear that the appellant was properly charged with the crime of larceny.

The next point made by counsel for appellant is that the verdict is contrary to law, for the reason that it does not find the exact age of the appellant. In our opinion, it was not necessary that the verdict should state his exact age. In many cases this might be impossible for want of proof. Besides, the statute does not require it. The provision on that subject is as follows: "In all cases of ~~580~~ felony tried hereafter before any court or jury in this state, if the court or jury find the person on trial guilty of a felony, it shall be the duty of such court or jury to further find and state whether or not the defendant is over sixteen (16) years of age, and less than thirty (30) years of age": Acts 1897, p. 69; Burns' Supplement 1897, sec. 8253i.

The verdict found that the appellant was over sixteen years of age, and under thirty years of age, and this was a full and literal compliance with the terms of the act of 1897. The object of the statute is attained when the fact is found, generally, that the age of the defendant, at the time of his conviction, is between sixteen years and thirty years. A person between these ages, at the time of conviction, is deemed a proper subject for the Reformatory at Jeffersonville, and, although he may pass the age of thirty years before the expiration of his term, that circumstance alone is not sufficient to require his transfer from the Reformatory to the Indiana State Prison at Michigan City. This construction of section 8 of the act of 1897 is sustained by the language of section 10 of the same act, which authorizes the board of managers of the Reformatory, "with the consent of the governor, to transfer temporarily to the Indiana State Prison, any prisoner who, subsequent to his committal, shall be shown to their satisfaction to have been, at the time of his conviction, more than thirty years of age."

It is further objected that there was no evidence as to the age of the appellant, and that, therefore, the verdict is not sustained by the evidence. We do not regard this omission as a sufficient cause for a new trial. The age of the defendant, in a prosecution for larceny, is not one of the facts charged in the indictment or information. It has nothing to do with the question of the guilt or innocence of the defendant. It is important only with reference to the place in which the defendant shall be confined during the term of his imprisonment. On this point, the verdict or finding of the court is advisory only,

and ⁵⁹⁰ any error made by the court or jury may be corrected by the board of managers, with the consent of the governor, and the prisoner transferred to the proper institution: Acts 1897, sec. 10, p. 74; Burns' Supplement 1897, sec. 8253k.

As these provisions in regard to persons charged with crime, who are less than thirty years of age at the time of conviction, are for the benefit of the defendant, it is his duty to declare or prove his correct age, and, if he fails to do so, he cannot complain if the court or jury gives him the benefit of the statute without such proof. In other words, the defendant is not injured by the failure to make the proof, and he cannot predicate error in the proceedings of the court upon a decision in his favor: *May v. State*, 140 Ind. 88.

In the next place, counsel say that the verdict does not, as the statute requires, name the crime of which the appellant was found guilty. The verdict found that the appellant was "guilty as charged in the indictment." This, we think, was a sufficient compliance with the law. In the information, the appellant was charged with the crime of petit larceny. The verdict that he was guilty as charged was equivalent to a finding that he was guilty of petit larceny. The misnomer of the information was a mere irregularity by which the appellant was not prejudiced: *Polson v. State*, 137 Ind. 519; *May v. State*, 140 Ind. 88.

In the last place, it is claimed that the judgment is erroneous because it includes a fine of one dollar, as well as the imprisonment provided for in the indeterminate sentence act of 1897. There is nothing in this objection. The section defining petit larceny makes a fine not exceeding five hundred dollars a part of the penalty for that offense. This portion of section 2007 of Burns' Revised Statutes of 1894 was not repealed by the indeterminate sentence act: *Bealer v. State*, 150 Ind. 390; *Zeilinski v. State*, 150 Ind. 700.

Finding no error in the record, the judgment is affirmed.

LARCENY — EMBEZZLEMENT — DISTINCTION.—If the goods of a master, fraudulently appropriated by his servant, were in the actual or constructive possession of the master at the time they were taken, the offense of the servant is larceny, and not embezzlement. If they were not in the master's actual or constructive possession at such time, the offense of the servant is embezzlement and not larceny: *Commonwealth v. Berry*, 99 Mass. 428, 96 Am. Dec. 767. A servant employed on a farm, having the care and custody of a mule belonging to his master, is guilty of larceny, if he fraudulently converts it to his own use and sells it: *Note to Commonwealth v. Ryan*, 31 Am. St. Rep. 566. An indictment for embezzlement must allege a fiduciary relation sustained by the de-

fendant: *State v. Roubles*, 43 La. Ann. 200, 26 Am. St. Rep. 179. Compare the monographic note to *Calkins v. State*, 98 Am. Dec. 126, on embezzlement, and which shows the distinction between larceny and embezzlement.

NEW TRIAL—CRIMINAL CASES.—Although the verdict in a criminal case is not sustained by the evidence, this is not cause for a new trial: *Huffman v. State*, 21 Ind. App. 449, 69 Am. St. Rep. 368.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

HILL v. REYNOLDS.

[93 MAINE, 25.]

SHERIFF'S DEEDS—PRESUMPTIONS.—In support of a sheriff's deed, it must be presumed that all prior proceedings touching the sale, up to the execution of the deed, were regular and sufficient according to statutory requirements and were properly proved by competent evidence.

SHERIFF'S DEEDS—VALIDITY.—A sheriff's deed is not void merely because it does not disclose the date of the execution upon which the land was sold, the amount of the judgment debt and costs in such execution, and the name of the court from which the execution issued. These facts may be supplied by the return on the execution.

SHERIFF'S DEEDS—SEPARATE SALES UPON SEPARATE EXECUTIONS—PRESUMPTION.—A sheriff's deed is not void because two sales upon two executions in favor of one creditor are embraced in one deed. If the proceedings upon the two executions appear to have been simultaneous throughout, and no objection was made to the sufficiency or regularity of the proceedings prior to the execution of the deed, it must be presumed that they were regular, and that it so appeared by the returns upon the executions; that the proceedings, though simultaneous, were separate; that there were separate seizures, separate notices, and separate sales for separate prices, upon the two executions.

SHERIFF'S DEEDS—SEPARATE SALES UPON SEPARATE EXECUTIONS.—If a sheriff has made, at the same time, two sales upon two executions in favor of the same creditor, and against the same debtor, the sales being to the same purchaser, he may complete the proceedings by executing and delivering one deed for both sales, and such deed is valid.

SHERIFF'S DEEDS—MISNOMER—EVIDENCE OF IDENTITY OF DEBTOR.—The fact that a sheriff's deed purports to convey the land of "Bertha A. Reynolds, and recites that the execution ran against Bertha Reynolds, does not render the deed inoperative ipso facto. The difference in name is not fatal to the deed, and it is competent to show the identity of the person by evidence aliunde.

J. H. Gray, for the appellants.

A. D. McFaul, for the appellee.

²⁸ SAVAGE, J. Real action, heard by the presiding justice, with right of exception. The plaintiffs claimed title under a sale on execution against the defendant. The presiding justice held that, under the judgment, execution, return of the officer on the execution, and the sheriff's deed, the plaintiffs had a prima facie title against the defendant. The only objection raised by the defendant was that the deed was insufficient. The question presented is not whether a sheriff's deed alone is prima facie evidence of title—a question which must be answered in the negative—but whether this sheriff's deed is sufficient in form. The deed is made a part of the case; but the judgment, execution, and return are not, although they were introduced in evidence.

²⁹ All questions not raised by exceptions are presumed to have been decided correctly; and all facts found are presumed to have been shown by competent proof. We must assume, therefore, that all the prior proceedings touching the sale, up to the execution of the deed, were regular and sufficient, according to statutory requirements, and were properly proved by competent evidence. And we have here only to inquire whether, upon this assumption, the deed in this case, upon its face, is sufficient so far as form is concerned, to show prima facie title in the plaintiff. It is objected that it is insufficient: 1. Because it does not disclose the dates of the executions upon which the land was sold, the amount of the judgment debt and costs in each execution, and the name of the court from which the executions issued; 2. Because the deed shows that two sales, upon two executions, are embraced in one deed; and 3. Because it appears by the deed that the land of Bertha J. Reynolds was sold upon executions against Bertha Reynolds. We will consider these objections in their order.

1. The statute declares that the officer shall execute and deliver to the purchaser a "sufficient" deed: Rev. Stats., c. 76, sec. 36. But it does not define what shall be deemed a "sufficient" deed. Undoubtedly, a sheriff's deed, in order to be itself alone prima facie evidence of a sale, must show upon its face that the officer had authority to make the sale, and must show all the essential requirements of a valid sale. But in this case it is important to notice that the plaintiffs did not rely upon the deed alone to establish a prima facie title. They intro-

duced the judgment, and the executions and returns thereon. The executions, which are presumed to be regular in form, showed their dates, the amount of the debts and costs, and the court from which they issued. The returns, if regular and complete, showed all of the officer's doings upon the executions. And in view of the fact that no objection was made to the returns, but only to the deed, we must assume that the returns were sufficient to show valid liens by seizure, and that the liens continued until the time of sale.

The question now arises whether it is necessary that a sheriff's ³⁰ deed should show such facts as it is objected are wanting in this deed, if they are shown by the return on the execution. The judgment and the execution and return, as well as the deed, are constituent elements of the evidence of title. And we think the deed may be aided, if necessary, by the return. In the opinion in *Welsh v. Joy*, 13 Pick. 477, Shaw, C. J., said: "An officer's deed may be aided by a return upon the execution showing that the statute has been duly complied with and the power pursued." In *Stinson v. Ross*, 51 Me. 556, 81 Am. Dec. 591, our own court held that it is unnecessary that a sheriff's deed should show that the statute requirements in regard to notice have been complied with, when the officer's return on the execution shows that the proper notices have been given. "That is sufficient," said Justice Walton. The defendant here cites and relies upon *Pratt v. Skolfield*, 45 Me. 386, in which case the recitals in the deed as to notice being defective, it was held inoperative. But in *Stinson v. Ross*, 51 Me. 556, 81 Am. Dec. 591, it was pointed out that in *Pratt v. Skolfield*, 45 Me. 386, the deed was the only evidence relied upon to prove the sale. And it was held that the decision in *Pratt v. Skolfield*, 45 Me. 386, was not applicable to a case where there was a good and sufficient return on the execution. It was held in *Hayward v. Cain*, 110 Mass. 273, that the omission in a sheriff's deed to state from what court the execution issued does not invalidate the deed nor render it void, if the deficiency in that respect is fully supplied by the writ of execution and the return thereon: See, also, *Rorer on Judicial Sales*, sec. 1011.

We think *Stinson v. Ross*, 51 Me. 556, 81 Am. Dec. 591, is decisive of the first point raised by the defendant. The return supplies what the deed lacks. This objection cannot be sustained.

2. The deed shows that the officer seized the land and sold it upon two executions in favor of Hill, Pike & Co., and against

Bertha Reynolds. The proceedings upon these two executions appear to have been simultaneous throughout. No objection having been made to the sufficiency or regularity of the proceedings prior to the execution of the deed, we must assume, as before, that the sales were regular, and that it so appeared by the returns ³¹ upon the executions; that the proceedings, though simultaneous, were separate; that there were separate seizures, separate notices, and separate sales for separate prices, upon the two executions; for if it appeared otherwise, the returns would have been objectionable: *Stone v. Bartlett*, 46 Me. 438; *Smith v. Dow*, 51 Me. 21. It only remains to inquire, then, whether, when an officer has made, at the same time, two sales upon two executions, in favor of the same creditors, against the same debtor, the sales being to the same purchaser, he may complete the proceedings by executing and delivering one deed for both sales. We perceive no good reason why he cannot. That the proceedings were simultaneous is no objection: *True v. Emery*, 67 Me. 28. It was held in *Chapman v. Androscoggin R. R.*, 54 Me. 160, that an equity of redemption could not be sold upon two or more executions jointly, in favor of two creditors. But that is not this case. Here the sales were not joint, and the creditors were one and the same—a marked distinction. Sales made as these were, were not prejudicial to the debtor. We think the reasoning in *True v. Emery*, 67 Me. 28, is applicable to this case. We quote: “No injury need be suffered by the debtor in selling his equity in this way. It may be an advantage to him. He can redeem from one sale and forego a redemption from the other, if he desires to. . . . If the debtor redeems from both sales, his property is restored to him. If he redeems from one sale only, he becomes tenant in common with the purchaser.” So in this case. The officer might have sold the property on one execution, for the full amount of both, and have applied the excess to the satisfaction of the other: *Rev. Stats., c. 84, sec. 22*. In which case the debtor could not have redeemed in part without paying the whole. Now he may redeem from one sale, and not from the other, unless he chooses to redeem from both. If the sales are upheld, the debtor’s right of redemption is not affected by the fact that both the sales are embraced in one deed. The sales are separable, and the debtor can redeem from either. The amount to be paid to redeem from either, though not found in the deed, may be found in the returns on the executions. We hold, therefore, that where, as in this case, there

are two sales of ³² the same property, at the same time, to the same purchaser, upon executions in favor of the same creditors, the sales may be embraced in one deed.

3. There is no question raised but that the Bertha Reynolds named in the executions, and the Bertha J. Reynolds whose land was sold, are the same person. Indeed, that fact was necessarily found by the presiding justice. But the defendant claims that when a sheriff's deed purports to convey the land of Bertha J. Reynolds, and recites that the executions ran against Bertha Reynolds, the deed is inoperative ipso facto. In this deed, the officer attempted to remedy the difficulty by inserting a recital that "Bertha J. Reynolds," the owner of the land, and "Bertha Reynolds," the debtor, were identical. But it was no part of the officer's duty to make such a recital, and it is not evidence of the truth of the fact stated: *Innman v. Jackson*, 4 Me. 237; *Phillips v. Sherman*, 61 Me. 548. Still, we think that the difference in the name was not fatal to the deed, and that it was competent to show the identity of the person by evidence aliunde. Persons sometimes use, and are known by, two or more names; and, when that is so, it is always competent to show the identity of the person by parol. So, if Bertha J. Reynolds was known as well by the name of Bertha Reynolds, that fact could be shown by parol. Even the strictness of the criminal law allows such proof upon the plea of misnomer. The parol evidence goes to the question of identity. The same principle applies as would in case there were two John Smiths in a town, in which case parol evidence would be admissible to show which one was the grantee in a deed to "John Smith," that is, to show the identity. If a person is known by one name as well as by another, and is sued in the former name and execution issue, it surely cannot be said that property held by him in the latter name is beyond seizure and sale on the execution, especially, as here, where no rights of third parties have intervened. In *Dutton v. Simmons*, 65 Me. 583, 20 Am. Rep. 729, where an attachment was held void, because in the return of the officer to the registry of deeds, the defendant was described as ³³ Henry "M." Hawkins, when his true name was Henry "F." Hawkins, by which latter name he was sued, this court said that the party claiming under the attachment "would have had, probably, less difficulty to contend with, had the error been the omission of the middle letter (as if written Henry Hawkins), or if only the initials of the Christian name had been written, but correctly given (as H. F. Hawkins). In such case, perhaps, the omission

could have been supplied by parol proof. A person may have different names by reputation. Proceedings have been sustained in important cases where a person is described in either one or the other of the above ways." And the court pointed out the distinction between a diminished description of a name and a description which was essentially and positively false. In the case at bar, the name was diminished, but not false. We think it was competent to show aliunde that Bertha J. Reynolds and Bertha Reynolds were the same person. Hence, there was no fatal variance in the names given to the debtor in the deed.

The defendant's counsel in his brief raises the point that the deed runs to Charles D. Hill and Willard H. Pike in their individual capacities, while this suit is in favor of the firm of Hill, Pike & Co. The latter fact does not appear in the bill of exceptions; and, if it did, the point would not be tenable.

The defendant does not press her exceptions to the ruling that her insolvency proceedings commenced after judgment and seizure were not a bar to this action.

Exceptions overruled.

SHERIFF'S DEEDS.—IT WILL BE PRESUMED IN SUPPORT of a sheriff's deed that he took the necessary steps required by law to make a valid sale: *Smith v. Crosby*, 86 Tex. 15, 40 Am. St. Rep. 818, and note. Regularity in proceedings leading up to a sheriff's sale will be presumed: *Leger v. Doyle*, 11 Rich. 109, 70 Am. Dec. 240.

SHERIFF'S DEEDS—VALIDITY.—A recital in a sheriff's deed of the authority under which the sale was made is not indispensable: *Harrison v. Maxwell*, 2 Nott & McC. 347, 10 Am. Dec. 611. A misrecital of a judgment or execution is not fatal to the title of the purchaser: *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769; *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441, and note. A sheriff's deed is sufficient if it shows that the officer had authority to sell: *Perkins v. Dibble*, 10 Ohio, 433, 36 Am. Dec. 97.

DEEDS—MISNOMER.—The law recognizes but one Christian or baptismal name, and the omission or insertion of, or even mistake in, the middle name in a conveyance is immaterial: Note to *Fallon v. Kehoe*, 99 Am. Dec. 350. See, also, *Blinn v. Chessman*, 49 Minn. 140, 32 Am. St. Rep. 536.

BRETON, PETITIONER.

[93 MAINE, 89.]

CRIMINAL LAW—CONCURRENT SENTENCES.—If it is not stated in either of two sentences imposed at the same time that one of them shall take effect at the expiration of the other, the two periods of time named in them run concurrently, and the two punishments are executed simultaneously. Upon the expiration of one of such periods of time the prisoner is entitled to his discharge upon habeas corpus.

M. L. Lizotte and S. J. Kelley, for the petitioner.

W. H. Judkins, county attorney, for the state.

41 WHITEHOUSE, J. On the first day of June, 1897, the petitioner was convicted in the municipal court of Lewiston upon two complaints for illegally keeping intoxicating liquors for sale, and received an alternative sentence of sixty days imprisonment in each case. It was not stated which imprisonment should be suffered first, nor that sentence in either case should begin at the expiration of the sentence in the other.

The petitioner duly entered an appeal in each case in the supreme judicial court at the September term of 1897, and on the fifteenth day of that term, being the eighth day of October, he was defaulted in each case, and the judgment of the court below affirmed and mittimus ordered to issue. Here again there was no order of the court declaring which imprisonment should be suffered first, or that either should begin only at the expiration of the sentence in the other. It appears that the petitioner was, in fact, committed on the same day that judgment was affirmed, by virtue of a mittimus issued by the clerk on that day, while court was in session. At the expiration of the sixty days named in that mittimus **42** the clerk, without any special order of the court, issued a mittimus in the second case bearing date December 6, 1897; and it is from imprisonment under this second mittimus that the petitioner asks to be released upon this writ of habeas corpus.

It is a familiar rule of the common law with respect to misdemeanors that the court may order the imprisonment on one count or indictment to begin on the expiration of that on another. Among the earliest cases in which this doctrine was applied, was the famous libel case of *Rex v. Wilkes*, 4 Burr. 325; but in *Regina v. Cutbush*, L. R. 2 Q. B. 379, it was declared

that a statute was necessary to give the court such power in cases of felony. In some of our states it has been denied that the court has such a power in any case, unless given by statute; 1 Bishop's Criminal Procedure, 1317; Prince v. State, 44 Tex. 480; James v. Ward, 2 Met. (Ky.) 271; and see opinion of Chief Justice Cooley in Bloom's Case, 53 Mich. 597, and Lampheres' Case, 61 Mich. 105. But the great weight of authority is undoubtedly the other way: 1 Bishop's Criminal Procedure, 1327; Kite v. Commonwealth, 11 Met. 581; United States v. Patterson, 29 Fed. Rep. 775. And such power has uniformly been exercised in this state with respect to sentences in cases of felony as well as of misdemeanor.

All the authorities agree, however, that in the absence of any statute, if it is not stated in either of two sentences imposed at the same time that one of them shall take effect at the expiration of the other, the two periods of time named will run concurrently, and the two punishments be executed simultaneously. Such Mr. Bishop declares to be the rule of the common law (1 Bishop's Criminal Procedure, 1310), and such has been the unquestioned rule of procedure in this state. It is familiar practice that wherever the court imposing several sentences desires to have one begin on the expiration of another, that fact is expressly stated in the sentence; and whenever the court inadvertently fails to have the sentence recorded in that form, or from leniency intentionally omits to add such a provision, and the convict is committed in pursuance of such sentences, he is either voluntarily released by the jailer, or discharged on habeas corpus at the expiration of the longest term named in either of the sentences.

⁴³ Nor has this rule ever been changed or its operation in any manner modified by the statutes of this state. The provision of the Revised Statutes, chapter 27, section 54, expressly empowering the court to affirm the judgment of the court below upon the default of the defendant in appeal cases, was manifestly not designed to have, and cannot reasonably be construed to have, any relation whatever to the question of cumulative sentences.

If no appeals had been taken in the cases now in question, and the petitioner had been committed in pursuance of the sentences imposed by the municipal court, in the form set out in the record, the two terms of imprisonment as above shown must have run concurrently. But the accused duly entered his appeals, and being defaulted, the judgment in each case was affirmed by the supreme court precisely as it was imposed in the

lower court, without specifying which sentence should be suffered first, or that either should succeed the other. If the accused "had been at the bar of the court or in actual custody" at the time these sentences were thus reimposed, he would have stood committed in execution of the sentences; and it has been seen that in such a case the terms of imprisonment in both cases would have begun to run concurrently from the day of the sentences, and would have expired at the same time.

It appears from the record that the respondent was in fact committed to jail on the eighth day of October, the same day that the sentences in question were imposed. If he had been at large at that time, he should have been under bail, and, when the default was entered, according to the correct and uniform practice, the clerk's docket would have had the entry: "Principal and sureties defaulted." But in these cases the docket only shows that the defendant himself was defaulted. The inference, therefore, seemed to be justified that he was not at large, but was in fact in custody on the day of the sentences. But, in order to remove any doubt upon this point, a copy of the jail calendar or "committal book" for that period has been examined, which shows that the petitioner was in fact committed to jail on the sixth day of October, on some other process, and that he was actually "taken before the supreme ⁴⁴ court" on the eighth day of October, the day when the sentences in question were imposed, and recommitted on that day.

It is immaterial, however, whether he was in custody or at large when the sentences were imposed, except that in the latter case the term of imprisonment would not commence until he was actually committed in execution of the sentences. When arrested and committed in vacation in execution of such sentences as these, the two terms must run concurrently from the time of commitment, precisely the same as if committed during a term of court. It makes no difference whether he is taken from the street or the courtroom. If the sentences are in the same form, they must have the same operation. The court omitted to state which sentence should be served first, and whether either should succeed the other. The "mittimus" is only a "transcript of the minutes of the conviction and sentence duly certified" by the clerk: Rev. Stats., c. 135, sec. 9. The clerk has no power to control the effect of the sentences of the court by changing the time of issuing the mittimus. To determine which sentence shall be served first, and whether one shall succeed the other, is clearly a judicial act which the clerk has no power to per-

form. He can only certify to the order of the court. In this case it is sufficient to say that the clerk was not directed or authorized by the court to perform any such act. It is a question to be determined by the court, because important rights of the accused may depend upon it. In *United States v. Patterson* (1887), 29 Fed. Rep. 775, the accused was sentenced to imprisonment for the term of five years upon each of three indictments "said terms not to run concurrently"; but the court said in the opinion: "It is manifest that the judgment or sentence in this case is uncertain in this respect. . . . It does not specify upon which indictment either of said terms of imprisonment is to be undergone. If the prisoner is to be detained in prison for three successive terms, neither he nor the keeper of the prison, nor any other person, knows, or can possibly know, under which indictment he has passed his first term, or under which he will have to pass the second or the third. If for any reason peculiar to either of said indictments, as for example, some newly discovered evidence,"⁴⁵ there should be a different face put upon the case, so as to induce the executive to grant a pardon of the sentence on that indictment, no person could affirm which of the three terms of imprisonment was condoned.

"If a formal record of any one of the indictments, and the judgment rendered thereon, were, for any reason, required to be made out and exemplified, no clerk or person skilled in the law could extend the proper judgment upon such record. He could not tell whether it was the sentence for the first, the second, or the last term of imprisonment. Without the last words of the sentence, declaring that the terms of imprisonment should not run concurrently, it would be sufficiently clear and certain. It would then, by force of law, be a sentence of five years' imprisonment on each indictment, and each sentence would begin to run at once, and they would all run concurrently. Such a sentence is lawful and proper. But the addition that they were not to run concurrently, without specifying the order in which they were to run, is uncertain, and incapable of application. It seems to me that the additional words must be regarded as void."

In the case at bar the mandate must therefore be, exceptions sustained. Prisoner discharged.

TRIAL—CUMULATIVE SENTENCES.—Where a prisoner has been convicted of several offenses, the court may give judgment upon each of them, directing that the term of imprisonment for one shall commence at the expiration of that for another: *Petition of McCormick*, 24 Wis. 492, 1 Am. Rep. 197; *State v. Smith*, 5 Day, 175, 5 Am. Dec. 132. But see *Ex parte Roberts*, 9 Nev. 44, 16 Am. Rep. 1.

SHERER v. SHERER.

[93 MAINE, 210.]

APPEAL—WHO MAY PROSECUTE.—An administrator cannot appeal from a decree of the probate judge authorizing an action on his bond. He is not a person "aggrieved," in the statutory sense, nor is he thereby concluded from asserting or defending any claims or property rights in any proper court.

C. E. & A. S. Littlefield, for the appellant.

L. M. Staples, for the appellee.

212 EMERY, J. The appellee cites the case of *Bulfinch v. Waldoboro*, 54 Me. 150, as conclusive authority against the claim of an administrator to appeal from a decree of the judge of probate allowing an action in the name of the judge upon the bond of the administrator. The appellant urges that the case cited was decided adversely to the administrator upon the ground that the administrator would be indemnified by the costs he would recover in case the action proved to be groundless. He further urges that this ground is untenable, since, as he says, costs cannot be recovered by the defendant against the judge, or anyone else, in such an action, and hence that the decision is erroneous and should not be followed.

It may not be amiss, therefore, to re-examine upon principle the question whether an administrator has a legal right to appeal from such a decree. Only persons "aggrieved" by a decree can **213** appeal therefrom (Rev. Stats., c. 63, sec. 23), but it is now long and well settled that a person is not "aggrieved" in the statutory sense of that word unless he would be concluded by the decree from the assertion of some claim of personal or property right. The mere fact that a person is hurt in his feelings, wounded in his affections, or subjected to inconvenience, annoyance, discomfort, or even expense by a decree does not entitle him to appeal from it, as long as he is not thereby concluded from asserting or defending his claims of personal or property rights in any proper court. Thus a debtor of a deceased person cannot appeal from the appointment of a particular person as administrator, notwithstanding his argument that the person appointed would act oppressively toward him: *Swan v. Picquet*, 3 Pick. 443. A person claiming property under a gift to him *causa mortis* cannot appeal from a decree charging the administrator with the property and ordering its

distribution among the next of kin, notwithstanding the argument that such decree would subject him to the annoyance and expense of a lawsuit: *Lewis v. Bolitho*, 6 Gray, 137. A creditor cannot appeal from a decree denying a petition for license to sell real estate for the payment of debts though such denial may compel him to incur the expense of an action and levy: *Henry v. Estey*, 13 Gray, 336. The stepmother of minor children, whose parents are both dead, cannot appeal from a decree appointing some other person as guardian, though such decree may deprive her of their custody and companionship: *Lawless v. Reagan*, 128 Mass. 592. Trustees of a fund bequeathed to a minor cannot appeal from a decree appointing a particular person as guardian for the minor however much they may prefer some one else, or even no guardian: *Deering v. Adams*, 34 Me. 41. A sister to a person of unsound mind cannot appeal from a decree appointing some other person to be the guardian of her relative, unless at least she has an interest in the estate of her relative as heir: *Briard v. Goodale*, 86 Me. 100, 41 Am. St. Rep. 526.

Tested by the rule above stated and illustrated, the administrator in this case is not aggrieved by, and cannot appeal from, the decree allowing a suit upon his bond. He is not concluded by it from ²¹⁴ asserting or defending any claim of personal or property right with respect to the estate, the heirs, legatees, or creditors. It does not even conclude him from asking the court to allow him in his account the expenses of the suit. His appeal, therefore, was rightfully dismissed. The case of *Bulfinch v. Waldoboro*, 54 Me. 150, is affirmed.

Exceptions overruled.

APPEAL—WHO MAY PROSECUTE.—Under a statute giving the right of appeal to any person aggrieved by a probate decree, the persons who may exercise such right are those who have rights which may be enforced at law and whose pecuniary interest may be established in whole or in part by the decree: *Briard v. Goodale*, 86 Me. 100, 41 Am. St. Rep. 526. An administrator de bonis non may appeal from a decree allowing an account of the former administrator: *Wiggin v. Swett*, 6 Met. 194, 39 Am. Dec. 716.

GILE v. ATKINS.

[98 MAINE, 228.]

LIENS—COMPUTATION OF TIME.—Under a statute creating a lien on all colts until the foal is six months old, to secure the service fee for the stallion, a colt foaled on the 12th of July becomes six months' old at the beginning of the 11th of the subsequent January, and the statutory lien upon the colt expires at that time.

LIENS CREATED BY STATUTE cannot be extended by estoppel.

C. W. Hayes, for the appellant.

W. E. Parsons, for the appellee.

225 EMERY, J. In this suit to recover for the service of a stallion, the plaintiff has attached the colt and asks for a specific lien judgment **226** against the colt, as well as a personal judgment against the defendant, its owner. He claims this lien judgment under chapter 25 of the statutes of 1895, which is as follows:

"Section 1. A lien is hereby created on all colts hereafter foaled in this state, to secure the payment of the service fee, for the use of the stallion begetting the same. Such lien is to continue in force until the foal is six months old, and may be enforced during that time by attachment of such foal."

The colt was foaled on the morning of July 12, 1898. When did it become "six months old" within the meaning of the statute? The answer must be that it became six months old on the eleventh day of January, 1899, at the beginning of that day. Age has always been reckoned that way, at least since the judgment of Chief Justice Holt in *Fitzhugh v. Pennington*, 1 Salk. 44, and the rule there laid down was explicitly affirmed in *Bardwell v. Purrington* (1871), 107 Mass. 419. It is to be presumed that the legislature in using that phraseology was aware how age had been reckoned and intended it to be so reckoned under the statute. The statutory lien, therefore, continued in force until the beginning of the eleventh day of January, 1899, and then expired. The plaintiff's attachment was not made till the next day, January 12th, when the lien no longer existed.

But the plaintiff insists that the defendant is estopped from questioning the seasonableness of the attachment, because when apprised, some two months previous, of the plaintiff's intention to enforce his lien, he assured the plaintiff the colt was foaled

on July 20th and thereby induced the plaintiff to delay the attachment. If the lien had been created by the defendant's stipulation or assertion in the first instance, it, perhaps, would have been extended by the defendant's statement as to a later time of foaling: *Oaks v. Moore*, 24 Me. 214, 41 Am. Dec. 379; but the lien in this case was created solely by statute and had such duration only as the statute gave it. Its entire vitality was dependent on the terms of the statute: *Frost v. Hsley*, 54 Me. 345. It could derive no life, nor prolongation of life, from any statements of the defendant made subsequent to the foaling. Such statements might estop the ²²⁷ defendant personally and might subject him to various liabilities and disabilities, but they cannot by estoppel enact or enlarge a statute. There was no lien on the colt of any kind or extent outside of the statute. There can be no lien judgment against the colt except upon the terms prescribed by the statute. One of those terms is that the attachment should be made before the colt was six months old. There is no provision that the parties, either or both, by estoppel or in any other way, may substitute a later date for the attachment.

Exceptions overruled.

TIME—COMPUTATION OF.—One born on the first day of February becomes of age on the last day of January, twenty-one years thereafter: *Note to Murfree v. Carmack*, 26 Am. Dec. 236.

LIENS ATTACHING BY LAW will not be disturbed by courts: *Cumming's Appeal*, 25 Pa. St. 268, 64 Am. Dec. 695; *Gracey v. Davis*, 3 Strob. Eq. 55, 51 Am. Dec. 663.

NORTHPORT WESLEYAN GROVE CAMPMEETING ASSOCIATION v. PERKINS.

[93 MAINE, 235.]

CORPORATIONS — REGULATIONS — LICENSE TAX.—An incorporated association that has laid out its land in streets, squares, and cottage lots and made perpetual leases of the lots to the occupants of the cottages, without other restriction than that they are subject to "such rules and regulations as the association may from time to time adopt," cannot subsequently, for revenue purposes, impose a license tax on persons visiting the occupants of the cottages to obtain orders for family supplies.

CORPORATIONS—REGULATIONS.—A corporation has no power to adopt rules or regulations injuriously affecting the rights of others under prior contracts, by annexing conditions not embraced in the contracts.

W. P. Thompson, for the appellant.

R. F. & J. R. Dunton, for the defendant.

²³⁸ EMERY, J. The Wesleyan Grove Campmeeting Association was incorporated by special act of the legislature, approved February 19, 1873, to be composed of the presiding elders of the Methodist Episcopal Church of the East Maine Conference with the preachers under their charge, and with the tent masters from Methodist Episcopal societies. It was empowered to acquire real and personal property and to sell the same, and "to establish such by-laws and regulations as are necessary for the further and proper management of their affairs, consistent with the laws of this state." The principal purpose of the corporators was to acquire and manage real estate for campmeeting purposes. The corporation afterward acquired the fee in that tract of land in Northport known as the "Northport Camp Ground," and which is a well-known summer resort. It laid out this land into cottage lots, with streets, squares, etc., and has leased the most of these lots in perpetuum to the owners of cottages thereon. The most of the cottages on the lots thus perpetually leased are occupied by their owners or others during the summer season. The streets leading through and across the grounds are open to public travel, except during campmeeting week when toll is taken at the entrance to the grounds. The only restriction stated in the case as existing in the perpetual leases is that they are "subject to such rules and regulations as the association may from time to time adopt."

The defendant has a place of business outside of, but near, these grounds of the association where he sells groceries, fruits, and provisions, mainly, of course, to the summer residents on the grounds. ²³⁹ He has been wont to go round to the cottages occupied by his customers upon the grounds and take orders for his goods, which orders he filled at his store outside the grounds and then delivered the goods so ordered to his customers at their cottages on the grounds. In doing this he passed over the streets on the grounds open (except during campmeeting week) to public travel. The plaintiff association owned a store on the grounds for the sale of various goods, which it leased for a rental.

In 1898, the trustees of the association voted that "any person or persons taking any order or orders for goods, wares, merchandise, fruit, or produce, or peddling groceries upon said grounds shall pay the sum of fifteen dollars for the season."

The defendant was duly apprised of this new rule, but continued to visit his customers upon the grounds and take their orders for goods, and refused to pay the fifteen dollars. This action is to recover that sum.

The question raised by the parties in the statement of the case is whether the trustees can lawfully impose this revenue tax on the business of taking orders for fruit, groceries, and provisions from cottagers upon the grounds of the association, there being no suggestion of any other purpose of the vote.

It is common knowledge that it is now an almost universal practice in cities, villages, and summer resorts, for dealers in such articles to go or send to the residences of the customers for orders for goods to be delivered there. The great convenience and comfort of this practice to families, especially those in summer cottages, are obvious. If the trustees of the plaintiff association can impose a revenue tax on that practice, they can make the tax so high as to break it up, and compel the occupants of the cottages on the lots held by them under perpetual leases to trade exclusively with some favored dealer on the grounds, or to go some distance to find a dealer outside of the grounds. Clearly, the cottagers cannot be subjected to such arbitrary power, unless it is plainly expressed in the terms of the leases under which they occupy. The only condition or restriction in the leases stated in the case is, that they are "subject to such rules and regulations as the association ²⁴⁰ may from time to time adopt." What the context might show we do not know. We are confined to the particular extract stated.

We think that condition or restriction imports only rules and regulations of a police nature, such as may be adopted for the preservation or improvement of the health, morals, religion, comfort, and convenience of all the occupants of the grounds. We do not think it can be extended to include an indefinite power to impose taxes directly or indirectly upon the cottagers at the discretion of the trustees, or even to abridge their comfort or convenience for mere purposes of revenue to the association, when the enjoyment of that comfort or convenience is in no way hurtful to the health, morals, religious sentiment, comfort, or convenience of that particular community.

It is argued that the tax is imposed upon the grocer, not on the cottager, and that the association is under no obligation to the grocer and can exclude him from the grounds entirely, or impose upon him any conditions of entrance including the payment of a revenue license fee.

The power of the association is not so absolute as that. It has laid out its grounds into lots, streets, and squares, and has invited people to take leases of lots, build cottages thereon, and occupy them as residents. It has thrown open the streets and squares to the free use of all persons occupying the cottages or having business or social relations with the cottagers, at all times except during campmeeting week, when a toll is charged at the entrance. This state of things has existed for more than twenty years. While, as before stated, the association has retained full power to make reasonable rules and regulations of a police nature, it has not apparently reserved, if it ever possessed, the power to prevent the use of the streets by the cottagers or by those having business or social relations with them, or to impose a tax for such use in the ordinary intercourse of life, or in other words, to shut off, or impose revenue conditions upon, the intercourse of the cottagers with the rest of the town or state.

It is again argued that the charter gave the association authority ²⁴¹ "to establish such by-laws and regulations as are necessary for the further and proper management of their affairs," and that license fees like that imposed in this case are necessary for requisite revenue. Granting, for the purpose of the argument only, that in making its leases and opening its streets, etc., the association might have reserved the power to impose such license fees as conditions or restrictions, it does not appear to have done so. The rights of the cottagers in their cottages and in the streets, and to the use of them for business and social intercourse acquired under the perpetual leases of the lots, cannot now be abridged without their consent to enable the association to raise a revenue. A corporation has no power to adopt rules or regulations injuriously affecting the rights of others under prior contracts, by annexing conditions not embraced in the contracts: *Illinois Conference Female College v. Cooper*, 25 Ill. 148 (133).

Plaintiff nonsuit.

CORPORATIONS—POWERS.—A corporation possesses only such powers and capacities as are specifically granted by the act of incorporation, or are necessary to carry into effect the powers thus granted: *Note to Abby v. Billups*, 72 Am. Dec. 148; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302.

ALIE v. NADEAU.

[98 MAINE, 282.]

JUDGMENT ON ENTIRE CONTRACT, WHEN A BAR.— But one action can be maintained for the breach of an indivisible contract, and the judgment in that action is a bar to a second suit.

JUDGMENT ON ENTIRE CONTRACT AS BAR.—A person cannot sever an indivisible contract, and thereby become entitled to maintain several actions for several breaches of it, simply by limiting his claim for damages in his earlier actions to less than full damages. In such case it is presumed that the plaintiff alleged and recovered in his first action all the damages that he had sustained.

JUDGMENT ON ENTIRE CONTRACT AS BAR.—A person wrongfully discharged before the end of the period covered by a contract for personal services, and paid the wages due him up to the time of his discharge, cannot, after suing for and recovering damages for the breach of the contract up to the time of suit, maintain another action to recover for the balance of the period covered by the contract. In such case, the first judgment is a bar to the second suit.

F. W. Hovey, for the appellant.

H. T. Waterhouse and B. F. Cleaves, for the appellee.

284 SAVAGE, J. The plaintiff brings this action to recover damages for the breach of a contract of service, whereby the plaintiff alleges that he agreed to enter and remain in the employment of the defendant for the period of six months from the ninth day of November, 1897, and that the defendant agreed to hire the plaintiff for the same period and to pay him for his labor the sum of ten dollars per week. The plaintiff further alleges that he entered upon the performance of the contract upon his part, and continued to work until January 15, 1898, upon which day he was discharged by the defendant, without lawful cause.

The case shows that the plaintiff was paid all wages due him up to the time of his discharge. On March 12, 1898, the plaintiff **285** commenced an action against the defendant for damages, alleging the same breach of the same contract as is alleged here, and claiming damages to the date of his writ. In that action he ultimately recovered judgment in damages for an amount equal to the weekly wages agreed upon from January 15, 1898, to March 12, 1898.

This action was commenced November 23, 1898, and the plaintiff now claims to recover damages from March 12, 1898,

to May 9, 1898, the remainder of the period covered by the contract. At the close of the testimony, the defendant's counsel requested the presiding justice to instruct the jury that the judgment in the former action was a bar to recovery in this suit. To a refusal to give this instruction the defendant excepted.

We think the requested instruction should have been given. Here is a single and indivisible contract, a hiring for the period of six months. When the defendant discharged the plaintiff he broke the contract. He broke it altogether. But there was only one breach. The plaintiff urges that while the contract was entire, the performance was divisible, that each week's work constituted a performance so far, and that the defendant was in default each week he failed to continue plaintiff in his employment. Hence, the plaintiff claims that an action will lie for each default. A little examination will show that this position cannot be sustained.

The contract of the defendant may be viewed in a twofold aspect. In the first place, he agreed to continue the plaintiff in his employment for a period of six months. That contract was entire and indivisible. There was a single breach of that part of the contract. He also agreed, we will assume, to pay the plaintiff weekly. Performance of that part of the contract by the defendant was divisible, and the plaintiff might have maintained an action for wages for services performed on each failure of the defendant to pay as he agreed. To this effect are most of the cases cited by the plaintiff from our own decisions. But such is not this case. After the plaintiff was discharged, he performed no more service, and was entitled no longer to wages as such, for the contract was at an end. The damage was the loss of his contract right to earn wages. He was entitled to recover all the damages he sustained ²⁸⁶ by the breach, both present and prospective, and for such a breach but one action can be maintained: *Sutherland v. Wyer*, 67 Me. 64. The plaintiff brought an action for breach of contract and recovered judgment for damages. It is to be presumed that he recovered all he was entitled to receive for that breach. We think the principles stated in *Sutherland v. Wyer*, 67 Me. 64, are decisive upon this point: See, also, *Miller v. Goddard*, 34 Me. 102, 56 Am. Dec. 638; *Colburn v. Woodworth*, 31 Barb. 381; *Olmstead v. Bach*, 78 Md. 132, 44 Am. St. Rep. 273; *James v. Allen County*, 44 Ohio St. 226, 58 Am. Rep. 821, and cases cited; 2 Sedgwick on Damages, 8th ed., sec. 366.

But the plaintiff contends that the rule should not apply here,

because in his first writ he claimed damages only to May 12, 1898. If this contention is sound, it follows that any litigant may sever an indivisible contract, and become entitled to maintain several actions as for several breaches of it, simply by limiting his claim for damages in his earlier actions, to less than full damages. We think this cannot be done. As we have already suggested, the law presumes that the plaintiff alleged and recovered in his first action all the damages that he sustained.

Exceptions sustained.

JUDGMENT—MERGER OF ACTIONS BY.—If a servant is wrongfully discharged, but his wages are paid up to that time, he cannot recover in separate suits for future installments of wages, but only for a breach of the contract of employment, and one recovery is a bar to another action under such contract: *Monographic note to McMullan v. Dickinson County*, 51 Am. St. Rep. 516, 517.

WEEKS AND POTTER COMPANY v. ELLIOTT.

[93 MAINE, 286.]

HUSBAND AND WIFE—INSOLVENCY OF HUSBAND—RIGHT OF WIFE TO PROVE CLAIM.—A wife to whom her husband is indebted may prove and enforce her claim against his estate in insolvency.

J. Williamson, for the appellant.

W. P. Thompson, for the appellee.

²⁸⁹ SAVAGE, J. Luella E. Elliott presented claims against the estate of her husband, Tilton A. Elliott, in insolvency. She claimed to be the indorsee and owner of one note for one thousand dollars, originally given by her husband to her father, A. E. Houghton, and by him indorsed to her; also the payee of another note, for five hundred dollars, ²⁹⁰ given to her by her husband; also the holder and owner of a due-bill for one hundred dollars. All these obligations were for money lent. These claims were admitted to proof by the judge of the court of insolvency, and the Weeks and Potter Company, a creditor, appealed.

The appellant's objections are: 1. That credit should be given on said claim for the support furnished to A. E. Houghton and wife by the insolvent debtor; and 2. That the claimant, as wife of the debtor, is not entitled to prove against the estate

of her husband a claim for money lent by her to him from her separate estate, and used by him in his business.

We do not think that either objection can be sustained. The first fails for want of proof. The case shows that the claimant's father, A. E. Houghton, and his wife, had been living in the family of the debtor for some time prior to his going into insolvency, but it does not show any contract, express or implied, by which Houghton is liable for his support either to the debtor or to the claimant. The inference is rather to the contrary, taking into account the relationship of the parties, and also certain pecuniary gifts or advancements which Houghton had made to the claimant, and of which the insolvent had the use in whole or in part. Nor does the case show facts which we think should be regarded as fraudulent as to creditors within the insolvent law.

The second objection presents the question whether a wife who holds a valid indebtedness against her husband can prove the same against his estate in insolvency. We have no doubt that she can. It is not claimed here that she may not lawfully contract with her husband, or that his note to her is not valid, or that the title to his note to a third person does not pass to her by sale or gift, and indorsement: *Motley v. Sawyer*, 34 Me. 540; *Webster v. Webster*, 58 Me. 139, 4 Am. Rep. 253; *Blake v. Blake*, 64 Me. 177. But it is claimed that, while the marriage relation continues, she cannot enforce her claim by proving it against his insolvent estate. At common law a wife could not maintain an action at law against her husband. And it has been held that, while the marital relation continues, her rights in this respect have not been enlarged by statute: *Smith v. Gorman*, 41 Me. 405; *Crowther v. Crowther*, ²⁹¹ 55 Me. 358. Her contract with her husband is not invalid, but the right to enforce it against him is suspended during coverture. But it is suspended no longer, and it is suspended only as against him: *Lane v. Lane*, 76 Me. 521; *Blake v. Blake*, 64 Me. 177. The wife's administrator was allowed to recover against the husband's executor, in *Morrison v. Brown*, 84 Me. 82. We see no good reason why the wife may not prove her claim against his insolvent estate. The proceeding is not against the husband, but against his estate, which is in the hands of the court for distribution. None of the reasons which weigh against suits between husband and wife are applicable in such a case. Her interests are not adverse to his. There is no controversy between them. There are no principles of public policy to be con-

travened by permitting her to prove her claim and share in the distribution. The statute provides that "creditors" may prove their claims. No distinction is made. And we think it is clearly the intent of the statute that all creditors shall share in the assets: See *In re Blandin*, 1 Low. 543, a case in point. The insolvent law has been in force for more than twenty years. During that time thousands of wives have proved claims against the estates of their husbands. If the law is as claimed by the appellant, it is certainly remarkable that the right to do so has not been challenged before this time.

The appellant has cited, and relies upon, decisions in Massachusetts to the effect that a note given by a husband to a wife cannot be collected even in the hands of a third party. This is so, because under the statute of Massachusetts, unlike our statute, husbands and wives may not contract with each other.

Appeal dismissed with costs. Decree of court of insolvency affirmed.

HUSBAND AND WIFE—WIFE AS CREDITOR OF HUSBAND.—A wife who has made a bona fide loan of her money to her husband shortly before his failure in business is entitled to the same protection out of his assets as are his other creditors: *Mayers v. Kaiser*, 85 Wis. 382, 39 Am. St. Rep. 849.

SNOW v. RUSSELL.

[93 MAINE, 362.]

JUDICIAL SALES—VALIDITY—COLLATERAL ATTACK—EQUITY JURISDICTION.—A statute providing that "sales of real estate may be made under the provisions of a will, without the executor giving bond when the will so provides" does not apply when the testatrix in her will requests that "no official bond be required to be filed by the executor in his said capacity," and the will makes no provision for the sale of real estate. Hence, a probate decree licensing the sale of land in such case by an executor without his giving bond is void and renders the sale invalid, subjecting both decree and sale to collateral attack, though no appeal is taken. A complainant, however, who is not in possession of the land, has a complete and adequate remedy at law, and cannot maintain a bill in equity to remove the alleged cloud upon his title arising from the executor's deed.

W. R. Anthoine and T. L. Talbot, for the appellant.

M. P. Frank and P. J. Larrabee, for the appellees.

³⁷¹ SAVAGE, J. Appeal from decree of presiding justice dismissing the bill of complainant. The complainant claims title to certain real estate described by mesne conveyances from the heirs of ³⁷² Submit C. Russell. The defendant George F. Russell claims title to the same premises by a conveyance from the executor of the last will and testament of Submit C. Russell. He alleges that the sale to him was made under license from the probate court, after due proceedings had, and was made for the purpose of raising money to pay the debts of the estate of Submit C. Russell. The complainant replies that one of the debts named in the petition for license to sell was a fraudulent and collusive judgment obtained by George F. Russell against his father John H. Russell, as executor, and that the personal estate of Submit C. Russell was sufficient to pay all the valid indebtedness of the estate, together with the expenses of administration. He also alleges that the conveyance from the executor to George F. Russell was without consideration except for the fraudulent and collusive judgment set forth, and that the conveyance was made in execution of a scheme to defraud him, to create a cloud upon the title of his real estate, and deprive him of his right to the same. The complainant replies further that the license under which the sale to George F. Russell was made was void, and that the sale and deed and all proceedings thereunder were void, for the reason that the executor, before making the sale, gave no bond to the judge of probate under the provisions of the Revised Statutes, chapter 71, section 4.

The answer of the defendants to these contentions of the complainant is, that the judgment complained of was neither fraudulent nor collusive, but was in every respect valid; and that he was excused from giving bond upon obtaining the license to sell real estate, by a valid decree of the judge of probate, under one of the provisions of the will of Submit C. Russell, which was, after nominating her husband, John H. Russell, as executor, "that no official bond in his said capacity be required to be filed in the probate court by him," and further, inasmuch as no appeal was taken, that the decree of the probate court, excusing the executor from filing bond, is conclusive in this proceeding.

The defendants, other than George F. Russell, are mortgagees, holding a mortgage from George F. Russell, given after he obtained the deed from the executor.

³⁷³ The complainant prays that the alleged fraudulent judgment may be annulled, that the cloud upon his title be removed

by canceling the executor's deed to George F. Russell, and the mortgage deed of George F. Russell to the other defendants.

The presiding justice found, and we assume it to be true, that Submit C. Russell died February 7, 1896, testate; that her will was admitted to probate on the third Tuesday of March, 1896, and her husband, John H. Russell, was appointed executor, and was not required to give bond as such; and that, in the meantime, certain of the heirs and devisees of Submit C. Russell had conveyed their interests in her real estate, which is the land described in this bill, to John H. Russell, and his title afterward came to the complainant. But, of course, the title or ownership of the complainant in the land was subject to the right of the executor afterward, if necessary, to cause it to be taken and sold for the payment of the debts of the estate. It further appears that suit was brought by George F. Russell against John H. Russell as executor, and the judgment complained of was obtained in November, 1897. In March, 1898, the executor petitioned the probate court for license to sell the real estate described, for payment of debts, and after due proceedings, on April 13, 1898, that court decreed that he have license to sell at public or private sale, without giving bond. No appeal was taken from this decree. License was issued, and under it, the executor sold the real estate to George F. Russell, and made, executed, and delivered to him a deed of the same. It should be said, also, that the testatrix, in the will, requested that "no official bond be required to be filed by" the executor "in his said capacity."

In view of the conclusion we have reached, it is not necessary to state any other facts. The first question which arises concerns the validity of the executor's deed. If that was invalid, then the complainant has a plain and adequate remedy at law, without the aid of the court in equity, and it will not be necessary in this case to consider the questions of fraud and collusion. For if the deed fails, all prior proceedings are, for the present, immaterial.

The presiding justice found that the probate court, in granting ³⁷⁴ the license, "adjudged that, under the provisions of the will, no bond was required," and ruled that, as no appeal was taken, the decree was conclusive. Was this ruling correct?

The jurisdiction and powers of the probate court, with respect to the settlement of the estates of deceased persons, are defined by statute. That court has no common-law jurisdiction. Its jurisdiction is special and limited, and it has no

powers save those conferred upon it by statute. So it is likewise true that the proceedings in petitioning for license to sell real estate, when it is necessary for the payment of debts, the granting of the license, and the conditions precedent to the authority to make a valid sale, are all regulated by statute. It is provided in the Revised Statutes, chapter 71, section 4, that persons licensed to sell real estate, "before proceeding to make such sales shall give bond to the judge for a sum, and with sureties to his satisfaction," conditioned for observing all provisions of law for the sale, for using due diligence, and for applying and accounting for the proceeds of the sale. This is the requirement of the statute, irrespective of the decree of the judge of probate. The giving of such bond is a prerequisite to the right by the executor to make a valid sale: *Campbell v. Knights*, 26 Me. 224, 45 Am. Dec. 107; *Parker v. Nichols*, 7 Pick. 111. In these cases, the sales were held invalid, on account of the failure of executors to make the oath then required by statute, but the reasons given are equally applicable here. Such sales are in derogation of the rights of heirs and devisees, and it has always been held that a purchaser under such a statute sale is bound to show strict compliance with statutory requirements, if his title is called into question. It follows, then, that unless relieved by other sections of the statutes, the executor acquired by his license no authority to sell; and, if he had no authority, he could not make a valid sale. The supposed authority for issuing such a license without bond is found in the Revised Statutes, chapter 64, section 8, where it is provided that "letters testamentary may issue, or sales of real estate may be made under the provisions of a will, without the executor giving bond when the will so provides." But this provision is of no avail here. This sale was not made "under the provisions of a will." This will makes no provisions
375 for the sale of real estate. It gives no authority to the executor to sell real estate. It is silent in regard to the disposition of the real estate, except by devise. A testator in his will may authorize his executor to sell the real estate, to pay legacies or debts, and he may authorize him to do so without giving bond. A testator may do this, but the court cannot. And this testator did not give such authority.

The defendants strongly contend, however, that it is now too late to question the validity of the license or of the sale made under it. Their position is that the judge of probate had juris-

diction of the subject matter, and that his decree therein, not appealed from, is conclusive. As to this, it may be observed in the first place, it is the statute, and not the judge of probate, which imposes upon the executor the duty of giving bond. The decree of the judge cannot make it any more or any less his duty to give a bond. The judge has no authority given him by statute to excuse the giving of such a bond. It may be argued that the judge of probate must of necessity decide in each instance whether a bond is required by statute or not. So he must. But, if he decide erroneously, as in this case, does it follow that his decree, in violation of the statute, remains in force, until reversed? If so, he may, by mistake, nullify a statute. Is not such a case rather like the many others where judges of probate have assumed jurisdiction, and mistakenly exercised powers not given them by statute, and where their decrees have been held to be void? Suppose, for instance, that a judge of probate should erroneously issue letters of administration to an administrator or letters of guardianship to a guardian, without taking bond—would such persons be authorized to act? Suppose he should grant administration, in violation of the statute, after the intestate had been dead twenty years, as in *Wales v. Willard*, 2 Mass. 124; or suppose he should appoint a guardian to an insane person without inquisition, and without notice, as in *Coolidge v. Allen*, 82 Me. 23—is there any question but that such decrees would be void? We think not. It has been so held in the cases cited, and in many others: See *Hunt v. Hapgood*, 4 Mass. 117; *Sumner v. Parker*, 7 Mass. 79; *Smith v. Rice*, 11 Mass. 507.

³⁷⁶ In the cases above supposed, the probate court would undoubtedly have jurisdiction to grant administration, or to appoint a guardian, but in so far as it exceeded its statutory powers in the exercise of its jurisdiction, its acts would be void; and, being void, we think they would not be validated by the failure to take an appeal.

We think some confusion may have arisen in the use of the word "jurisdiction" in the decisions. It is frequently said that the decrees of probate courts, touching matters within their jurisdiction, when not appealed from, are conclusive upon all persons: See *McLean v. Weeks*, 65 Me. 421; *Decker v. Decker*, 74 Me. 465. And, hence it may have been concluded that inasmuch as the licensing of sales of real estate is within the jurisdiction of the probate court, therefore all its decrees relative thereto are conclusive. But we think this conclusion is not

the correct one. The rule is stated more precisely and accurately in *Waters v. Stickney*, 12 Allen, 1, 90 Am. Dec. 122, where it is said that "decrees of probate courts in matters of probate, within the authority conferred upon them by law, are conclusive." The distinction we note has been discussed in cases in this state and Massachusetts.

In *Smith v. Rice*, 11 Mass. 507 (decided in 1814, while we were a part of Massachusetts), the court said: "But if it appear that the judge of probate exceeded his authority, or that he has undertaken to determine the rights of parties over whom he had no jurisdiction, . . . or that he has proceeded in a course expressly prohibited by law, in all such cases the party aggrieved, if without any laches on his part he has had no opportunity to appeal, may consider the act or decree void. . . . The defect is not confined to what may be considered strictly a want of jurisdiction of the cause; but, if the inferior tribunal proceed in a manner prohibited, or not authorized by law, the proceeding is void." This case was cited with approval of this position in *Peters v. Peters*, 8 Cush. 529.

In *Wales v. Willard*, 2 Mass. 124, the court said: "It [a decree not appealed from] is not, therefore, an erroneous exercise of his judgment, but it is an assumption of power against law, and the ³⁷⁷ grant is ipso facto a nullity." There, as here, the point was raised that the decree was conclusive until reversed on appeal, and it was expressly overruled: *Sumner v. Parker*, 7 Mass. 79.

The court in *Pierce v. Prescott*, 128 Mass. 140, after stating the rule that judgments of probate courts on all matters within their jurisdiction are conclusive, said: "The law is so laid down by this court, although it is sometimes said, as if in qualification of the rule, that, although the probate court has jurisdiction over the subject matter, yet if it clearly exceeds its powers, or does an act prohibited by law, its decree may be avoided in collateral proceedings as well as by appeal; but this is only one way of saying that where the jurisdiction of the court over the subject matter is in any particular limited, then its decree is not binding, if it oversteps the limits fixed. It is not in such case the indiscreet exercise of a power granted, but the doing of an act for which no power is given, or which is expressly prohibited."

Our own court, in *Coolidge v. Allen*, 82 Me. 23, said: "It is undoubtedly true that a judgment of the probate court upon matters within its jurisdiction is conclusive until it is re-

versed. But it is equally true that jurisdiction of the subject matter only is not sufficient. The preliminary requisites, and the course of proceedings prescribed by law, must be complied with or jurisdiction does not attach, and the judgment will be, not voidable merely, but void, and may be avoided by plea and proof."

The distinction noted is well illustrated in this case. The judge of probate adjudged that there was a necessity for the sale of the real estate to pay debts. Such a judgment would be conclusive unless appealed from. It is a question which the law authorizes him to determine. It is within his jurisdiction to decide whether there is a necessity for a sale or not. But the law has not authorized him to decide that an executor need, or need not, give a bond before he can sell real estate under a license. The statute itself has decided that question.

We are, therefore, of the opinion that the decree of the probate court licensing the sale of the real estate without bond is open to attack collaterally, in an action at law, as well as by appeal, and that therefore the complainant does not require relief in equity.

³⁷⁸ The complainant is not in possession of the land, and for that reason he cannot seek to have the alleged cloud upon his title arising from the executor's deed removed by proceedings in equity. He has a plain, adequate, and complete remedy at law. As was said in *Robinson v. Robinson*, 73 Me. 170, "it is not the purpose of equity to try titles to real estate and put one party out of possession and another in": *Gamage v. Harris*, 79 Me. 531, and cases cited.

The bill must be dismissed, and we think, under the circumstances of the case, it should be dismissed without prejudice and without costs. If the defendant Russell seeks further to collect his judgment, all the questions involved can, and properly should, be determined by the probate court, either upon a new application for license to sell real estate, if any is made, or upon a settlement of the executor's account.

Bill dismissed without prejudice.

EXECUTORS AND ADMINISTRATORS—SALES BY.—Where a statute requires an administrator to give a bond, upon sale by him of the lands of his intestate, his omission to give such bond renders the sale void: *Currie v. Stewart*, 27 Miss. 52, 61 Am. Dec. 500, and note; *Williamson v. Williamson*, 3 Smedes & M. 715, 41 Am. Dec. 636. See, too, *Campbell v. Knights*, 26 Me. 224, 45 Am. Dec. 107.

CHAPMAN v. DECROW.

[93 MAINE, 373.]

DOGS—PROPERTY IN.—A dog is property, for an injury to which an action will lie.

DOGS—NUISANCE—RIGHT TO KILL.—Although a dog is unlicensed, no individual is authorized to kill it on the ground that it is a public nuisance, unless he has suffered damages therefrom peculiar to himself and distinct from the injury to the public.

DOGS—RIGHT TO KILL.—A statute which provides only for the killing of unlicensed dogs by a constable under a warrant, impliedly forbids such killing by any other person.

DOGS—RIGHT TO KILL—CONSTRUCTION OF STATUTE.—Under a statute providing "that any person may lawfully kill a dog found worrying, wounding, or killing any domestic animal outside the inclosure or immediate care of his owner," the dog must be caught at and engaged in the act denounced by the statute in order to justify killing it; and it is not enough to justify the killing that the dog may have worried or killed a domestic animal before, nor that there is a belief or apprehension that it intends to do so again, if it is not actually engaged in the act.

D. N. Mortland and M. A. Johnson, for the appellant.

C. E. & A. S. Littlefield, for the appellee.

³⁸⁷ **STROUT, J.** Trespass for killing plaintiff's dog. Defendant claimed that the dog was trespassing on his premises, and was "then, or had been immediately before the shooting, engaged with two other dogs in chasing and worrying his domesticated animals, to wit, tame rabbits," and that the killing was therefore justified.

The dog had not been licensed for that year, as provided by chapter 287 of the laws of 1893, though it had been the previous year. The defendant claimed that, because he was not licensed, there was no property in him, and that anybody had the right to kill him, and therefore the owner had no redress.

The first exception is to the ruling of the presiding justice "that a dog is property," and to the instruction, "the defense takes the position that in this case there was no property in this dog to his owner; that he was a nuisance; that any person could kill and slay him because he was not licensed and registered according to the statute of this state. I rule against that proposition."

³⁸⁸ By the common law, a dog is property, for an injury to which an action will lie: *Wright v. Ramscot*, 1 Saund. 84; *Athill v. Corbet*, Cro. Jac. 463. But larceny could not be committed of a dog. But by statute 7 and 8 George IV, it is made a misdemeanor to steal one.

In *State v. McDuffie*, 34 N. H. 526, 69 Am. Dec. 516, it is said: "Dogs are domesticated or tame animals, and as much the subject of property or ownership as horses, cattle, or sheep. Trespass or trover will lie for them." In *State v. Harriman*, 75 Me. 562, 46 Am. Rep. 423, where it was held by a divided court that a dog was not a domestic animal within the statute making it a criminal offense to kill or wound a domestic animal, it was said: "The dog is recognized as property so far as to afford a civil remedy for an injury, but seldom, if ever, any other."

If, as claimed by defendant, the fact that this dog was not licensed for that year rendered him a nuisance, which is not admitted, he would be a public nuisance, and no individual was authorized to abate it, unless he was suffering damages therefrom peculiar to himself and distinct from the injury to the public: *Corthell v. Holmes*, 87 Me. 27.

But the defendant claims that the statute of 1893 has, by implication, outlawed all dogs not registered as therein provided. That act provides for an annual registration of dogs before the first day of April, and imposes a penalty upon the owner if he fails to so register. Section 10 requires the selectmen, "within ten days from the first day of May, to issue a warrant" for killing unlicensed and uncollared dogs.

No authority to kill them is given under this statute except to a constable acting under such warrant—which cannot issue before the first day of May nor after the lapse of ten days thereafter. The legislature evidently contemplated, notwithstanding the requirement for registration before April 1st, that dogs might be registered and licensed at a later date; for in the same section which requires registration before April 1st, it is provided that "a person becoming the owner or keeper of a dog after the first day of April, not duly licensed, shall cause it to be registered, etc., as provided above."

³²⁹ It may be that the owner who fails to register his dog before April 1st may be liable to the penalty prescribed, but, if he sells the dog at any time after that date, the then owner may register him and protect him against the warrant in the constable's hand; and, as revenue appears to be one object of the act, it would seem that the owner who neglected to register on April 1st might do so later. This dog was shot April 24th, before the municipal officers were authorized to issue a warrant.

It will be noticed that this act provides only for killing unlicensed dogs by a constable under a warrant, and impliedly forbids killing by any other person.

The postponement to May 1st of the authority to the municipal officers to issue a warrant indicates an intention to allow the negligent owner opportunity to repair his forgetfulness.

But it is said that section 11, which provides a civil liability for stealing or killing a registered dog, by implication outlaws all that are not registered, and authorizes anybody to steal or kill them. If this provision adds any remedy not known to the common law, it certainly does not take away rights previously existing by it.

The defendant justified the killing upon the ground that the dog was worrying his rabbits. He asked the court to instruct the jury, "that if the jury find that, at the time of the shooting of the dog, he had killed or wounded the defendant's domesticated animals on the defendant's premises, and was again there apparently for the purpose of destroying others, the defendant would not be liable for killing the dog, but would be justified in so doing, even though the dog was not at the time in the act of destroying or worrying the animals."

This instruction was refused and rightly so. It was too broad. The Revised Statutes, chapter 30, section 2, provides that "any person may lawfully kill a dog that suddenly assaults him or another person, when peaceably walking or riding, or is found worrying, wounding, or killing any domestic animal, outside of the inclosure or immediate care of his owner." Under this statute, it is not enough that the dog may have worried or killed a domestic animal before, nor that there is a belief or apprehension that he intends to do so, to justify ³⁹⁰ the killing, but he must be in the act—or, in the language of the charge in this case, "the worrying and the shooting must be substantially at the same time." "If he had been worrying the defendant's rabbits, and had been merely momentarily checked or held at bay by the girls at the door, or the hired man or anybody else, and the dog had not quit the chase, but was still intent at a little distance from out his tracks where he had previously begun to worry the animals, and he was still intent upon the act of worrying, either returning or ready to return as soon as the obstructions for getting at the rabbits were removed from him, I think you would be authorized, if you see fit to say that his worrying and killing

were coexistent acts, concurrent acts, done at the same time, that they were one transaction."

The defendant has no reason to complain of this instruction. In *Morris v. Nugent*, 7 Car. & P. 572, it was held that, to justify shooting a dog, he must be actually attacking the party at the time. In that case the dog ran out and bit the defendant's garter, and the defendant turned round and raised his gun and the dog ran away, and he shot the dog as he was running away, and it was held he was not justified. So, to justify shooting a dog because he was worrying fowl, and could not otherwise be prevented, the party must show that the dog was in the act of worrying at the time: *Janson v. Brown*, 1 Camp. 41. See, also, *Wells v. Head*, 4 Car. & P. 568. It is not sufficient that the party had reasonable cause to believe that the dog was proceeding to worry the animals, but he should also have reasonable cause to believe that it was necessary to kill the dog to prevent him from killing the animals. So held in *Livermore v. Batchelder*, 141 Mass. 179.

The refusal to instruct and the instructions given were in accordance with law, and fully protected defendant's rights.

Exceptions overruled.

DOGS—PROPERTY IN.—Dogs are property, and the owner may recover damages against a trespasser injuring them, although they have no market value: *Heiligmann v. Rose*, 81 Tex. 222, 26 Am. St. Rep. 804; *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 66 Am. St. Rep. 754, and note.

DOGS—NUISANCE—RIGHT TO KILL.—A dog which is in the habit of haunting the dwelling-house of another by day and night, and which, by barking and howling, disturbs the peace and quiet, becomes a nuisance, and, if necessary, may be killed: *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175, and note; *Hubbard v. Preston*, 90 Mich. 221, 30 Am. St. Rep. 426. But see *Bowers v. Horen*, 93 Mich. 420, 32 Am. St. Rep. 513, and note. One has no right to kill a dog on the owner's premises, on the pretense that he is a nuisance, because on former occasions he has bitten other persons: *Perry v. Phipps*, 10 Ired. 259, 51 Am. Dec. 387.

BELFAST SAVINGS BANK v. LANCEY.

[93 MAINE, 422.]

INSOLVENCY—EFFECT ON ATTACHMENT LIENS.—If land under attachment has passed to the attachment defendant's assignee in bankruptcy, and has been sold by the latter, subject to the attachment, and the attachment defendant has subsequently died, and his estate has been duly adjudged and decreed insolvent, the attachment is thereby dissolved, and the attachment plaintiff is not entitled to a special judgment against the property attached.

R. F. & J. R. Dunton, for the appellant.

J. Williamson, S. S. Hackett, and J. W. Manson, for the appellees.

⁴²⁷ WISWELL, J. On February 15, 1875, the Belfast Savings Bank loaned to William K. Lancey the sum of ten thousand dollars, for which Lancey gave to the bank his five promissory notes for two thousand dollars each, the first payable in six months' time and the others respectively at intervals of six months thereafter, with interest payable semi-annually, secured by a mortgage upon real estate situated in Augusta.

After three of these notes had become due, on November 11, 1876, this action was commenced upon the first two notes that matured, and an attachment made thereon, November 13, 1876, of all of the real estate and interest therein which Lancey had in Somerset county. On November 17, 1876, the plaintiff commenced, or attempted to commence, a foreclosure of the mortgage given to secure these five notes, by publishing on that day a notice of foreclosure in a newspaper.

On April 13, 1878, considerably more than four months subsequent to the attachment of his real estate in Somerset county, above referred to, Lancey filed his voluntary petition in bankruptcy in the United States district court for this district; he was subsequently adjudged a bankrupt, and an assignee was duly appointed, who, on May 21, 1885, in pursuance of a license granted by the district court, sold the real estate attached upon the writ in this suit, subject to the attachment. On June 2, 1879, Lancey was duly granted a discharge by the district court from all debts provable against him in bankruptcy.

William K. Lancey died—the exact date is not stated—within one year prior to the April term, 1899, of this court in Waldo ⁴²⁸ county. Letters of administration were duly granted by the probate court in Somerset county, which court had juris-

diction of his estate; and at the January term, 1899, of the probate court in that county, the estate of Lancey was duly adjudged and decreed insolvent and commissioners in insolvency appointed.

At the January term, 1899, in Waldo county, the plaintiff's counsel filed a motion setting out the fact of the attachment of real estate upon the writ, specifically describing the different parcels of real estate that were thereby attached, the bankruptcy proceedings above referred to, and asking to have the amount due upon the notes in suit determined and that it might have special judgment therefor and execution against the property attached. By agreement of the parties, the question of what was the fair market value of the real estate described in the plaintiff's mortgage, on November 17, 1877, was submitted to the jury, who found that such value on that day was eleven thousand dollars. The case was then reported to this court to determine the rights of the parties.

The counsel for the defense assigns several reasons why the plaintiff should not have the judgment he asks for. He claims that a foreclosure of the mortgage by publication was commenced on November 17, 1876; that by operation of law and in pursuance of an agreement to that effect contained in the mortgage, the mortgage became fully foreclosed in one year therefrom; and that the value of the mortgaged premises, as ascertained by the jury, although not sufficient to satisfy the entire mortgage debt at that time, should be applied in payment of the three notes that were due at the time the foreclosure was commenced and in payment of the interest due at that time upon all of the notes; such an application would much more than pay the two notes sued in this action.

This involves the question as to whether the proceedings commenced by the bank on November 17, 1876, for the purpose of foreclosing the mortgage, was sufficient for that purpose. The notice of foreclosure was published in a newspaper that was both printed and published in the county where the mortgaged premises were situated, but the certificate of the register of deeds reads: ⁴²⁹ "Received Nov. 30, 1876, and copied from the 'Maine Standard,' a public newspaper, published weekly at Augusta, Maine," etc. The statute in force at that time required a mortgagee who desired to foreclose his mortgage by publication to give public notice in a newspaper printed in the county where the premises are situated, if any. This certificate does not state that the newspaper referred to was printed in that county.

This court has in several instances decided that such a certificate was fatally defective: *Blake v. Dennett*, 49 Me. 102; *Bragdon v. Hatch*, 77 Me. 433; *Hollis v. Hollis*, 84 Me. 96. But it is urged in behalf of the defense that these cases are not conclusive, because this case differs from those cited in this respect, that here the newspaper was in fact printed in the county; and it is claimed that this fact may be shown, by parol evidence, that the statute does not require any certificate from the register of deeds, but only makes it *prima facie* evidence of the facts stated.

We do not think it necessary to determine this question, in which others, not parties to this action, and not bound by the decision of the case, are especially interested, the bank having conveyed the mortgaged premises a number of years ago, because, in our opinion, there is another reason why the plaintiff is not entitled to the special judgment he asks for against the property attached.

The plaintiff does not claim that it is entitled to a general judgment against the estate of Lancey. The bankruptcy proceedings already referred to are a bar thereto, but it desires a special judgment and execution thereon against the property attached more than four months prior to the time of the filing of the petition in bankruptcy. This he would have been entitled to (*Bowman v. Harding*, 56 Me. 559; *Leighton v. Kelsey*, 57 Me. 85), except for the death of Lancey and the decree of insolvency upon his estate.

The only reason why the plaintiff should have a special judgment against the property attached upon the writ is, that it has at the time of such judgment a valid and subsisting attachment of the property, unaffected by any subsequent proceeding. Does the attachment made upon the writ in this case still exist so as to create ⁴³⁰ a valid lien upon the property attached? We think not. By the Revised Statutes, chapter 81, section 68, "all attachments of real or personal estate are dissolved by final judgment for the defendant; by a decree of insolvency on his estate before a levy or sale on execution," etc.

In this case, as we have seen, there has been a decree of insolvency upon the estate of the original defendant, made before judgment; such decree, by the express terms of the statute, dissolves "all attachments" previously made of his real or personal estate.

The plaintiff's counsel argues with much force that the object of this statute is that, in the case of the insolvency of the

estate of the deceased person, his whole estate may be used as assets for ratable distribution among all of his creditors, but that, under the circumstances of this case, the property attached does not belong to the estate, and cannot in any event be taken by the administrator for a proportional distribution among creditors; and that, consequently, there is no reason why the attachment should be dissolved; and that the legislature could not have intended that the terms of the enactment should apply to the circumstances of this case.

The very plausible and strong reasons given by the counsel why the statute should not apply to a case like this under consideration might be considered by the legislature as sufficient to require its modification in some respects by legislative enactment; but the matter is wholly within the province of the law-making department of the government. We cannot disregard the plain and unequivocal terms of the section referred to. This is especially true when we consider the judicial construction which the statute has already received, and the history of legislative action relative to the subject matter.

A similar statute was in force in Massachusetts when the case of *Bullard v. Dame*, 7 Pick. 239, was decided in 1828. In that case, the real estate attached had been conveyed by the defendant subsequent to the attachment. Pending the action the defendant died, and his estate was adjudged insolvent and commissioners in insolvency appointed. The property attached could not be taken by the administrator for general distribution among creditors, and the ⁴³¹ reasons why the statute should not be regarded as applicable were as strong in that case as in this; but the court held that, according to the terms of the statute, the attachment was dissolved by the decree of insolvency.

In *Ridlon v. Cressey*, 65 Me. 128, the real estate of the defendant was attached on the writ and was subsequently conveyed by the defendant; before judgment for the plaintiff the defendant died, and his estate was later decreed insolvent. The plaintiff, as in this case, sought a special judgment against the real estate attached because of the attachment, because the defendant had no title or interest therein at the time of his death, and the property would not become assets of the estate for distribution among his creditors; but the court decided that "the decree of insolvency dissolved the attachment."

In *Grant v. Lynam*, 4 Met. 471, a different, but somewhat similar, statute was under consideration, and the court came

to a similar conclusion as to its effect. A debtor, whose goods were attached, mortgaged them to another creditor; he then applied for the benefit of the Insolvent Act, and all his estate was thereupon assigned under the statute. It was urged, in behalf of the existence of the attachment, that the only purpose of dissolving the attachment must have been to let in the general creditors to the proceeds of the attached property; and that, unless the property was so situated that the assignee could obtain it, the reason for dissolving the attachment would not exist. The court, in its opinion, expressed the belief that it could not have been the purpose of the legislature to dissolve the prior attachment of one creditor in order to let in the subsequent mortgage of another creditor, and that it was probably a case that was overlooked by the legislature; but the court held that the attachment was dissolved, saying: "But yet the words of the statute are positive and explicit, that it shall dissolve the attachment without condition or qualification."

We have already spoken of the history of legislation upon this subject. It must be considered as throwing considerable light upon the purpose of the legislature.

The legislature of 1875 (Pub. Laws 1875, c. 39) modified this ⁴³² statute so as to make it precisely as the plaintiff's counsel thinks it ought to be. The first section of that chapter provided that the portion of the statute which we have been considering should be understood and construed to apply to such property as the debtor owned, or in which he had an interest at the time of his death, and which, by the dissolution of such attachments, become assets belonging to his estate, to be distributed among his creditors. The second section of this chapter was as follows: "When property has been legally attached on a just debt or claim, and the debtor subsequently sells or conveys the same, subject to such attachment, such attachment shall not be dissolved or affected by his death or by a decree of insolvency in the probate court, but judgment may be entered and execution issue in the same form as if the estate was solvent, and may be levied upon the property attached in the same manner as if the debtor were alive."

The terms of this chapter were so full as to disclose, not only the intention of the legislature, but the reasons, as well, which actuated the passage of the amendment; the first section contained almost an argument in its favor. But the succeeding legislature, by an act approved February 23, 1876, chapter 143, some months before the commencement of this

suit, repealed chapter 39 of the Public Laws of 1875 without qualification.

We are, therefore, forced to the conclusion that the plaintiff's attachment was dissolved by the decree of insolvency upon the estate of the original defendant, and that, consequently, it is not entitled to a special judgment against the property attached.

Case remanded to the court at nisi prius for disposal in accordance with this opinion.

INSOLVENCY—EFFECT ON ATTACHMENTS.—Assignment under the Massachusetts Insolvent Act of 1838 dissolves attachments previously levied: *Ward v. Proctor*, 7 Met. 318, 39 Am. Dec. 782. But see *Upton v. Hubbard*, 28 Conn. 274, 73 Am. Dec. 670.

SOLOMAN v. AMERICAN MERCANTILE EXCHANGE.

[93 MAINE, 436.]

LIBEL—EVIDENCE—OPINIONS.—In an action for libel it is not competent for a witness to give his opinion, as evidence, as to the purpose of the defendant in publishing or posting the alleged libelous publication.

J. R. Mason and H. W. Oakes, for the appellant.

H. J. Chapman, G. H. Worster, and L. C. Stearns, for the appellee.

437 WISWELL, J. Action of libel. The defendant, against whom a verdict was rendered, alleges various exceptions. It will be necessary to consider only one of these, because we are forced to the conclusion that the ruling therein complained of was erroneous.

The alleged libel consisted of a printed advertisement, published by the defendant, of judgments for sale, as follows:

“Established 1894. Incorporated.

“AMERICAN MERCANTILE EXCHANGE.

“16 Broad street, Bangor, Maine.

“Accounts for Sale.

“The following judgments on accounts are for sale at our office. A liberal reduction made off face value. Full information cheerfully given. Correspondence solicited. Apply or write to above address.”

Then follows a list of the judgments advertised, included in which is the following item relative to the plaintiff: “Soloman,

Lewis, pedler, 23 Boyd St., Bangor, judgment on account dry goods merchants, \$32.27." The judgment against the plaintiff had been satisfied prior to the publication of the alleged libel.

Two witnesses, called by the plaintiff, were each asked this question: "What is it [the alleged libel] posted for?" One answered: "It is posted for to spoil the character of men that do not pay their bills." The answer of the other was: "To notify creditors for to be careful for those people."

In the opinion of the court this question was improper and should have been excluded. It called for the opinion of witnesses upon a subject matter as to which opinions are not competent. It was not within any of the many exceptions to the general rule, that a witness must confine himself to a statement of facts and cannot give his opinion upon questions involved.

There has been considerable conflict of authorities as to whether an exception to this general rule should or should not be made to the extent of allowing witnesses in actions of libel and slander to ⁴³⁸ give their opinion as to whom the libelous or slanderous language was intended to apply, and, although quite a number of cases have held that this kind of evidence is admissible, our court in *White v. Sayward*, 33 Me. 322, following the authority of *Van Vechten v. Hopkins*, 5 Johns. 211, 4 Am. Dec. 339, and *Gibson v. Williams*, 4 Wend. 320, decided that even this was not permissible.

There has also been considerable difference of opinion as to whether or not a witness should be allowed to give his understanding of what the defendant meant by the language used, either written or spoken. But we think that the better rule is, that where the whole language is capable of being fully stated to the jury, and where the speaker's or writer's meaning is conveyed in direct terms and not by incomplete expressions, nor by signs, gestures, pictures, or the like, it is not competent for a witness to give his opinion or understanding of the meaning intended by the one who used the language. Under such circumstances, the words speak for themselves. This was so decided in *Snell v. Snow*, 13 Met. 278, 46 Am. Dec. 370. In *Leonard v. Allen*, 11 Cush. 241, although evidence of this character was decided to be competent, it was for the reason that the slanderous charge was made in part by gestures and signs, and the court called attention to the distinction between that case and the case of *Snell v. Snow*, 13 Met. 278, 46 Am.

Dec. 370. In *Stacy v. Portland Pub. Co.*, 68 Me. 279, this court held that a witness may not, ordinarily, be allowed to state what he understood the speaker to mean by the words spoken by him.

While this is not the exact question presented by the exceptions, we think that there is less reason why a witness should be allowed to state his opinion of the purpose of such a publication than that he should be permitted to give his opinion or understanding of the meaning of the language used, and that there is more danger in the former than in the latter testimony. We cannot, of course, tell to what extent this testimony may have affected the judgment of the jurors upon a question for their determination. It is sufficient that it may have been harmful and may have had an improper effect.

Exceptions sustained.

LIBEL—EVIDENCE—OPINION.—How a witness understood a publication charged to be libelous is not a proper question. The witness can state facts only, and leave it to the court and the jury to draw the conclusions. It seems a contrary rule might prevail where the publication was shown to but one person, or to but few: *Maynard v. Beardsley*, 7 Wend. 560, 22 Am. Dec. 595, and note.

MATSON v. TRAVELLERS' INSURANCE COMPANY.

[93 MAINE, 469.]

INSURANCE — ACCIDENT — INTENTIONAL INJURY. — A person insured under an accident insurance policy containing a provision that the insurance shall not cover "intentional injuries inflicted by the insured, or by any other person, except burglars and robbers," cannot recover when he is violently assaulted by another person, not a burglar or robber, who intentionally strikes him, causing the injury under which he claims to recover.

W. R. Prescott, for the appellant.

C. E. & A. S. Littlefield, for the appellee.

472 **WISWELL, J.** The plaintiff was the holder of an accident insurance policy issued by the defendant corporation, which entitled him to receive, if disabled by bodily injuries sustained through "external, violent, and accidental means," a certain sum of money each week while the disability continued. The policy contained a clause which provided that the insurance should not cover, among other things, "inten-

tional injuries, inflicted by the insured, or by any other person, except burglars or robbers."

During the life of the policy, the plaintiff was violently assaulted by another person not a robber or burglar, who attempted to strike him upon the head with a stick, but the plaintiff, to protect himself, put up his arm and received the blow thereon, and thereby sustained the injury which he claims entitles him to recover of the company. The plaintiff was without fault in the affair, and the assault upon him is admitted to have been intentional. These facts appear in the agreed statement of facts upon which the case comes to this court.

Under these circumstances, is the plaintiff entitled to recover? We think not. Were it not for the provision that the insurance should not cover injuries intentionally inflicted by another, it might, perhaps, be said, as some courts have held, that, as to the insured, the injury, for which he was in no way responsible, was an accident, an unforeseen event, a casualty.

But here the injury was sustained in one of the very ways which the policy provided should not be covered by the insurance—intentional injuries inflicted by another. An act may be intentional while its result may be unforeseen and unintentional, and therefore accidental, within the meaning of the contract of insurance. But ⁴⁷³ that is not so in this case; here the act was intentional—it was directed against the insured and direct injury to the insured was intended.

All the cases that have been called to our attention in which a similar provision of an accident insurance policy has been considered hold that where the injuries sustained by the insured were intentionally inflicted by another, and where the intentional acts of another that caused the injury were aimed at the insured, there could be no recovery: *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661; *Hutchcraft v. Travellers' Ins. Co.*, 87 Ky. 300, 12 Am. St. Rep. 484; *Utter v. Travellers' Ins. Co.*, 65 Mich. 545, 8 Am. St. Rep. 913.

The suggestion made by counsel for plaintiff, that the injury sustained by the plaintiff was not the precise one intended by the person making the assault, is rather too much of a refinement. The plaintiff sustained an injury inflicted by another—that other intended to inflict injury upon the plaintiff and accomplished his purpose. The case is clearly within the exception made by the contract of insurance. In accordance with the stipulation of the report, the entry will be, plaintiff nonsuit.

INSURANCE, ACCIDENT—INTENTIONAL INJURY.—If a policy of accident insurance provides that the insurer shall not be liable for “intentional injury inflicted by the insured or any other person,” there can be no recovery when the injury to the insured is intentional as to the person inflicting it, though accidental as to the insured, in that he does not expect or anticipate it: *Butero v. Travelers’ Ins. Co.*, 96 Wis. 536, 65 Am. St. Rep. 61, and see note thereto. Compare *American Acc. Co. v. Carson*, 99 Ky. 441, 59 Am. St. Rep. 473, and note.

GLEASON v. SANITARY MILK SUPPLY COMPANY.

[93 MAINE, 544.]

NEGOTIABLE INSTRUMENTS—JOINT OR SEVERAL NOTES—EVIDENCE.—A note beginning “We promise to pay.” and signed, “The Sanitary Milk Co., T. A. Houston, Trs.,” is the several note of the company, and not the joint note of the company and its treasurer. Such note is not admissible under a declaration declaring upon it as the joint note of the company and its treasurer.

TRIAL—VERDICT—PRACTICE.—In actions of contract against more than one defendant, the jury may return a separate verdict as to each defendant, or as to two or more defendants jointly, and judgments shall be entered accordingly.

H. W. Oakes, J. A. Pulsifer, and F. E. Ludden, for the appellant.

W. C. Philbrook and C. W. Hussey, for the appellee.

548 HASKELL, J. Assumpsit against two defendants upon their joint promissory note. Plaintiff read in evidence, subject to exception, a promissory note beginning: “We promise to pay,” and signed, “The Sanitary Milk Co., T. A. Huston, Trs.” This was the several note of the milk company, and not the joint note of the company and its treasurer: *Draper v. Massachusetts Steam Heating Co.*, 5 Allen, 338; *Miller v. Roach*, 150 Mass. 140. The note was therefore **549** inadmissible under the count that misdescribed it, for that describes a joint note, while the note admitted was a several note: *Atkins v. Brown*, 59 Me. 90.

Under the money count the plaintiff might recover of the milk company, as he seems to have taken its several note in payment of his debt. This he may do by force of the Revised Statutes, chapter 82, section 84. “In actions of contract against more than one defendant, the jury may return a separate verdict as to each defendant, or as to two or more defendants jointly, and judgments shall be entered accordingly”:

Smith *v.* Loomis, 72 Me. 51; Castle *v.* Belfast Foundry Co., 72 Me. 167.

The judge allowed the jury to determine in what capacity the defendant Huston signed the note. This was error. The note speaks for itself. The verdict was against both defendants. It should have been against the milk company only.

Motion and exceptions sustained.

NEGOTIABLE INSTRUMENTS—JOINT OR SEVERAL NOTES.

A promissory note commencing with "We promise to pay," and signed "San Pedro Mining and Milling Company, F. Kraus, President," is the note of the company only: *Liebscher v. Kraus*, 74 Wis. 387, 17 Am. St. Rep. 171, and note. Compare *Reeve v. First Nat. Bank*, 54 N. J. L. 208, 33 Am. St. Rep. 675.

GREENLEAF *v.* GALLAGHER.

[93 MAINE, 549.]

SALES—DELIVERY—ACTION FOR PURCHASE PRICE.—

An action for the price of goods sold cannot be maintained until delivery is proved. Proof of tender and refusal is not sufficient.

SALES—DELIVERY—ACTION FOR PURCHASE PRICE.—

If the delivery of goods sold is unconditional, the vendor is entitled to the contract price, but, if the delivery is conditional, the price named in the condition only can be recovered.

SALES—DELIVERY—ACTION FOR PURCHASE PRICE.—

In order to maintain an action for the contract price of goods sold and delivered, actual delivery to, and acceptance by, the purchaser is necessary, and if the title to the goods only has passed subject to the vendor's lien for the price, this form of action cannot be maintained.

SALES—DELIVERY—VENDOR'S LIEN—ACTION FOR PURCHASE PRICE.—

If the title to goods sold has passed subject to the vendor's lien for the price, his remedy is for a breach of the contract of bargain and sale, and the rule of damages in his favor is not the contract price, but the difference between that and the value of the goods retained.

E. W. Whitehouse, for the appellant.

L. Greenleaf, for the appellee.

550 HASKELL, J. Assumpsit for goods sold and delivered. The writ contains two counts. The first is for a book sold and delivered under special contract. The second is account annexed for the same. The verdict was for plaintiff for thirty-six dollars and ninety-two cents, and the defendant moves for a new trial.

The special contract is in writing of the following tenor:

"\$35.00

Dec. 9th, 1895.

"New England Magazine, Boston, Mass.:

"Please send me one copy of your complete work entitled 'Men of Progress,' to be issued in one large royal octavo volume, with portraits and biographical sketches of representative men of the state of Maine, for which I agree to pay you or order the sum of Thirty-five Dollars upon issue of the part containing my sketch and portrait, and delivery of the photo-engraved plate of the portrait of myself. My photograph and data for sketch I promise to furnish within thirty days or pay the above-mentioned sum upon delivery of the work.

"Name: S. J. GALLAGHER.

"Address: Togus, Me."

That contract is to deliver one volume of "Men of Progress," containing defendant's sketch and portrait, he to furnish sketch and portrait within thirty days and pay thirty-five dollars upon issue of part containing the sketch and portrait, or the same upon delivery of the book.

⁵⁵¹ The upshot of it is, that defendant, if he elects to furnish sketch and portrait, agrees to pay the thirty-five dollars when the "part" containing the same shall be issued; but if he does not furnish the sketch and portrait, then his payment is deferred until delivery of the book; but he is to pay anyhow.

The evidence shows that the defendant did not furnish the sketch and portrait, and that the book was left at his office, in his presence, without them. The only competent evidence of delivery is the defendant's own testimony, which is uncontradicted. He says that, when the book was tendered to him at his office, he at first refused to receive it, but a friend, dropping in, said to the agent: "Why don't you let him have it on the same conditions that he left mine, that he would take it at the publisher's prices. I said 'No,' at first; . . . finally, I consented that he should leave it on the same conditions. He says, 'I will leave it on those conditions, will I?' and I said, 'Yes, sir,' and nothing more was said about it really of any consequence. He left the book and went off, and the book is on the top of my desk and has never been opened."

This action cannot be maintained until delivery be proved. If unconditional, the plaintiff should receive the contract price, and the verdict must stand. If conditional, then the price named in the condition can only be recovered, and the verdict must be set aside as against law.

In actions for goods sold and delivered, "actual delivery to and acceptance by the purchaser of the goods sued for is essential": *Atwood v. Lucas*, 53 Me. 508, 89 Am. Dec. 713. The title to the goods may have passed, subject only to the vendor's lien for the price, yet, so long as that attaches, this form of action does not apply. The remedy in such case is for breach of the contract of bargain and sale, where the rule of damages in favor of the vendor is not the contract price, but the difference between it and the value of the goods retained, for he should not keep the goods and have their price too. A vendor's lien presupposes that the title has passed, for the lien cannot attach to one's own goods. The delivery may have been sufficient to pass the title, but the possession is retained ⁵⁵² to uphold the lien. *Merrill v. Parker*, 24 Me. 89, is sometimes cited as against this doctrine, but, on reference to the errata at the end of the volume, it will be seen that the apparent dissenting opinion of Shepley, J., is really the opinion of the court and upon which judgment was rendered, and which supports the doctrine of this opinion. Nor are we aware of any opinion of this court against it. Where the vendee may not maintain trover against the vendor for the goods, he should not have an action for the price, as goods sold and delivered, but damages only for the breach of the contract of bargain and sale: *Edwards v. Grand Trunk R. R. Co.*, 54 Me. 111. In *State v. Intoxicating Liquors*, 73 Me. 278, *Merrill v. Parker*, 24 Me. 89, is cited to uphold the doctrine that the title to merchandise forwarded C. O. D. passed when the bargain was struck, and that case is again cited in *State v. Peters*, 91 Me. 37, to the same doctrine, which is perfectly sound, but, by chance, the further apparent doctrine of *Merrill v. Parker*, 24 Me. 89, is given in dictum not strictly accurate, that "the vendor could sue for the price." The two cases, *Wing v. Clark*, 24 Me. 366, and *Chase v. Willard*, 57 Me. 157, cited with *Merrill v. Parker*, 24 Me. 89, sustain the doctrine of *State v. Intoxicating Liquors*, 73 Me. 278, but not the dictum. They hold that, as the title passed when the bargain was struck, loss of the goods by fire and by theft, before actual delivery, fell upon the vendee.

To maintain this form of action, actual delivery and acceptance must appear. Tender and refusal will not do: *Moody v. Brown*, 34 Me. 107, 56 Am. Dec. 640; *Atwood v. Lucas*, 53 Me. 508, 89 Am. Dec. 713. In the latter case it is said: "It is laid down by Mr. Saunders that, to support an action for goods sold and delivered, the plaintiff must prove not only such a delivery

as will vest the property in the goods in the defendant, but such a delivery as will divest himself of all lien upon the goods and enable the defendant to maintain trover for them without paying or offering to pay for them: Saunders on Pleading and Evidence, 536." The same doctrine is indorsed in Edwards v. Grand Trunk R. R. Co., 54 Me. 105; Means v. Williamson, 37 Me. 556; Pettengill v. Merrill, 47 Me. 109; Gooch v. Holmes, 41 Me. 523.

In Tufts v. Grewer, 83 Me. 412, the court says: "A tender ⁵⁵³ does not in our law transfer the title to the vendee. The facts show that the plaintiff was to retain title to the fountain until the price should be paid. But the defendant refused to make the partial cash payment called for by the terms of the sale, or to accept any possession or control of the property, so that even an equitable title to the property did not pass to him."

Actual acceptance of delivery may sometimes be inferred from the conduct of the parties. "Silence and delay for an unreasonable time are conclusive evidence of acceptance. The burden of action is upon the buyer, and he must seasonably notify the seller of his refusal to accept the goods": White v. Harvey, 85 Me. 212. See Merrill Furniture Co. v. Hill, 87 Me. 18; Goslen v. Campbell, 88 Me. 450.

In the case at bar, the book ordered was tendered to the defendant, who refused acceptance. It thereby did not become the property of defendant, and this action for goods sold and delivered cannot be maintained, except on the general count for goods sold and delivered, by virtue of defendant's acceptance of the book upon new terms then made him by plaintiff's traveling man, who tendered the book. Those terms were payment at the publisher's price. The evidence fails to disclose what that price was, and therefore the verdict cannot be said to rest upon the new contract. Indeed, the fair inference is that it does not, for the publisher's price for a single volume is not likely to be thirty-six dollars and ninety-two cents, including interest. If it be said that the new terms were unauthorized by the publishers and not binding upon them, although made by their agent, then defendant is not bound thereby, as no title to the book passed to him, because his acceptance under a void contract would be no acceptance: Wood v. Finson, 89 Me. 459.

Motion sustained. Verdict set aside.

SALES—DELIVERY—ACTIONS FOR PURCHASE PRICE.—TO maintain a general count of indebitatus assumpsit for goods sold and delivered, proof of an actual delivery to and acceptance by the purchaser of the goods sued for is essential: *Atwood v. Lucas*, 53 Me. 508, 89 Am. Dec. 713; *Messer v. Woodman*, 22 N. H. 172, 53 Am. Dec. 241; *Moody v. Brown*, 34 Me. 107, 56 Am. Dec. 640, and extended note.

SOPER v. CREIGHTON.

[93 MAINE, 564.]

SALES—DELAY IN SHIPMENT—LIABILITY FOR PRICE. A sale of goods by a merchant in one state to a merchant in another, "to be shipped prompt," means that the goods will be shipped from the seller's warehouse in the state of his place of business so that they will arrive at the buyer's place of business with reasonable dispatch and, unless so shipped, the title to the goods does not pass to the buyer, and he is not liable on his contract of purchase. In such case, a month's delay in the arrival of the goods is unreasonable and avoids the sale.

R. I. Thompson, for the appellants.

J. E. Moore, for the appellees.

⁵⁶⁹ HASKELL, J. Plaintiffs are merchants in Boston; defendants, traders in Thomaston. May 4th, O'Brien, a salesman of plaintiffs, sold defendants a car of feed, to be shipped at once. May 5th, plaintiffs wrote defendants: "We have this day sold you one car Blish Milling Co. at \$17.75 mixed feed 100 lbs. B. Pts. To be shipped prompt." May 26th, defendants wrote plaintiffs: "We bought a car of feed to come right along. That was some four weeks ago, but it is not here yet. We have been looking for it all this time, and its not coming has hurt our business very much. If it is not near here shall have to give it up and order elsewhere." Again, June 4th, defendants wrote plaintiffs: "We bought a car of feed of you, through your Mr. O'Brien, May 5th, to be delivered at once. Now it has not arrived yet, and we have lost the sale of a car of feed, and it is so late in the season that we shall not want it. You will please cancel the order, as we will not be able to receive it."

The contract contemplated the prompt delivery by plaintiffs on board carrier, at Boston or vicinity, merchandise consigned to ⁵⁷⁰ defendants. Upon such delivery the title to the goods would have passed to defendants. Without such delivery the title would not pass, except by defendants' consent. Such de-

livery was never made. Plaintiffs never shipped the merchandise from Boston or vicinity, where prompt delivery would insure prompt receipt of the goods by the purchasers, as contemplated by the contract of sale. The delay was unreasonable. The defendants might well cancel their order, or, which is the same thing, refuse to receive the goods not shipped for a month after they should have been. Plaintiffs had no right to sell defendants' goods to be shipped promptly, presumably from their warehouse or store in Boston, and compel defendants to await their arrival from the west, with delay of perhaps a month in transit.

Had plaintiffs sold the goods to be delivered in Thomaston, they might have shipped them from the four corners of the universe, had they seasonably delivered them, and they would have become the defendants' goods.

The title to the goods did not pass to defendants, nor were the goods seasonably shipped under the contract of sale so as to enable plaintiffs to have damages. They did not mind the contract themselves and defendants need not: *Rhoades v. Cotton*, 90 Me. 453.

Judgment for defendants.

SALES—TIME OF SHIPMENT.—In the contracts of merchants, time is of the essence. A statement descriptive of the time or place of shipment is ordinarily to be regarded as a condition precedent upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract: *Note to Gill v. Benjamin*, 54 Am. Rep. 625.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

JONES v. HOME SAVINGS BANK.

[118 MICHIGAN, 155.]

TRUSTS AND TRUSTEES—ACCOUNTING—PRESUMPTION.—If the trustee of an infant, upon the beneficiary's arriving at majority, renders him an account, and he, without personal knowledge of the transactions, gives a receipt upon the basis of such account, and subsequently discovers, upon the examination and finding of a referee, that, at the time when the receipt was given, a large amount of money or property remained in the trustee's hands unaccounted for, the finding of the referee so far overcomes the prima facie effect of the receipt as to raise a presumption of liability on the part of the trustee or his estate.

TRUSTS AND TRUSTEES—LIMITATIONS OF ACTIONS.—The fact that money due a cestui que trust is allowed by him to remain in the hands of the trustee after the termination of an express trust does not change the nature of the debt, and, until an accounting is had or demanded, the statute of limitations does not begin to run.

G. W. Radford, for the appellant.

S. T. Miller, for the appellees.

156 MONTGOMERY, J. The hearing below was on an appeal from an allowance of a claim in favor of the appellees by commissioners on claims. On the trial the circuit judge directed a verdict of claimants. The Home Savings Bank, a creditor of the estate, defended against the claim in the circuit court, and has brought error to review the proceedings on the trial.

As the circuit judge directed a verdict, the question presented is, whether the testimony was conclusive to sustain the claim presented, or whether, on the other hand, an inference of nonliability could be drawn from the whole testimony. The facts were

not much in dispute. A history of the claim is, in brief, as follows: Catherine H. Jones, the grandmother of claimants, died testate, October 18, 1865, bequeathing to J. Huff Jones and Augustus P. Thompson a considerable estate in trust for these claimants, to possess, control, and manage until the younger of the two claimants should attain the age of twenty-one years; and empowered the trustees to lease, sell, or mortgage any portion of the estate, and to invest the trust property in first-class securities, and to divide the property equally when the younger child should attain the age of twenty-one years. J. Huff Jones became the active trustee in the ¹⁵⁷ management of the estate. Henry K. Jones became of age October 30, 1883, and Matilda C. Jones on August 2, 1886. On August 11, 1886, the trustees deeded to Henry K. and Matilda C. Jones, jointly, all of the real estate held in trust, the active trustee, however, retaining control of the personal estate until March 10, 1888, when the personal property for which he accounted was turned over in equal parts, and a receipt in full given by each of the claimants, purporting to discharge the trustees from liability as trustees. J. Huff Jones died testate, but insolvent, December 16, 1892. Shortly after the death of J. Huff Jones, Henry K. Jones for the first time made an examination of the books of J. Huff Jones kept in connection with the books of another trust estate in the hands of J. Huff Jones, and found substantial inaccuracies in the accounts. This directed his attention to the accounts kept by deceased of the transactions relating to the property of these claimants, and on examination he found inaccuracies in the account. Further investigation by the claimant and experts resulted in the presentation of the present claim.

After the presentation of this claim, an expert accountant, Mr. John H. Clegg, was employed to examine the books of deceased, and the result of his examination was a finding that there was on the 10th of March, 1888, a balance due the claimants of twenty-five thousand two hundred and fifty-eight dollars and seven cents over and above the amount accounted for. A stipulation was entered into between the parties, reading as follows:

"It is hereby stipulated and agreed by and between the parties hereto that the examination of the books and accounts of said suit, made by John H. Clegg, at the trial of this cause on appeal, may be treated as though such examination had been made by a referee, under the direction of the court, for the purpose of ascertaining the amount due from J. Huff Jones to claimants, according to the books and papers of J. Huff Jones in the condi-

tion they were in at the time of his death, and the amount so found due may be considered the same as if found by a referee; provided, that this stipulation shall not be construed ¹⁵⁸ as in any way to prevent the raising of an issue of fact or law based upon any alterations, omissions, or errors which may be found in the original entries and accounts of said J. Huff Jones, deceased, as to any part or all of said account, or of any question concerning the same; or likewise to prevent the raising of an issue of fact or law based upon dealings between claimants and said deceased concerning said claim, or any part thereof.

(Signed) "SIDNEY T. MILLER,
"Attorney for Claimants.

(Signed) "GEORGE W. RADFORD,
"Attorney for Appellant."

In our view, this stipulation left very little to litigate. As regards the amount of the liability, if any existed, if the contestant had been able to show that this amount was incorrect because of omissions and errors or alterations, it was open to it to do so; but we do not think the testimony offered, when analyzed, impeaches the finding of Mr. Clegg. No special errors in the account are pointed out in the brief of appellant's counsel, while the testimony of witnesses for claimants shows very clearly that the changes were made in the books either by J. Huff Jones or his bookkeeper, and in his lifetime.

It is contended by appellant's counsel: "That it was a question of fact for the jury to determine whether the investigations of Clegg were of sufficient weight and accuracy to show fraud, mistake, or misrepresentation on the part of J. Huff Jones, and thus overthrow the settlement of March 10, 1888, between claimants and J. Huff Jones, by which the former acknowledged payment in full, and released J. Huff Jones from all liability."

We do not agree with this contention. All the testimony in the case was to the effect that neither of the claimants had ever examined into the transactions of deceased as their trustee. There was no pretense that they had personal knowledge of the transactions. It cannot be gainsaid that the receipts on their face show that the trustee had assumed to account for all the avails of their property; and yet at the very date, as appears from the ¹⁵⁹ finding of Mr. Clegg (whose finding is of the force of that of a referee), there was in the hands of this trustee, unaccounted for, more than twenty-five thousand dollars. We are all satisfied that the testimony on behalf of claimants not only

overcame the evidence afforded by the receipts, but that it left no room for any inference inconsistent with liability.

The point is made that the claimants were barred by the statute of limitations before Mr. Jones' death. As essential to this contention, the counsel for appellant argues that, by the terms of the trust, the same terminated when Matilda C. Jones reached the age of twenty-one years. But the mere fact that money due the cestui que trust is allowed by him to remain in the hands of the trustee does not change the nature of the debt, and, until an accounting was had or demanded, the statute of limitations did not run: 2 Perry on Trusts, 4th ed., sec. 863, p. 513, and cases cited; Frank v. Morley, 106 Mich. 635.

Judgment affirmed.

The other justices concurred.

TRUSTS AND TRUSTEES—SETTLEMENT.—A trustee is bound to put his cestui que trust in possession of the full and true state of his affairs before any settlement will bind: Diller v. Brubaker, 52 Pa. St. 498, 91 Am. Dec. 177.

TRUSTS AND TRUSTEES.—THE STATUTE OF LIMITATIONS does not operate in case of an express trust: Note to Seculovich v. Morton, 40 Am. St. Rep. 108. See, also, Fawcett v. Fawcett, 85 Wis. 332, 39 Am. St. Rep. 844, and note; monographic note to Miles v. Thorne, 99 Am. Dec. 389-399, discussing the general subject.

ALDINE MANUFACTURING COMPANY v. PHILLIPS.

[118 MICHIGAN, 162.]

LIENS—RIGHT TO SELL.—A common-law lien gives the party detaining the chattel the right to hold it as a pledge or security for the debt, but not to sell it.

LIENS—JURISDICTION OF EQUITY TO ENFORCE.—Courts of equity have no jurisdiction to enforce payment of liens by foreclosure upon a bill filed for that purpose only.

LIENS—JURISDICTION OF EQUITY.—Courts of equity, having acquired jurisdiction for other purposes, may order sales of property to satisfy liens.

LIENS—JURISDICTION OF EQUITY TO FORECLOSE.—The statutory lien of a corporation upon its stock for the debt of a stockholder cannot be enforced in equity if the remedy at law is adequate.

LIENS—JURISDICTION OF EQUITY TO FORECLOSE.—Although an accounting is asked in a bill by a corporation to foreclose a lien upon stock for the debt of the stockholder, equity does not thereby acquire jurisdiction in the absence of anything to show that the claim is not one with which a court of law can deal as an open account and enforce by judgment and execution.

Butterfield & Keeney, for the appellant.

More & Wilson, for the appellee.

163 HOOKER, J. The defendant being a stockholder in the Aldine Manufacturing Company, that company filed the bill in this cause, claiming an indebtedness due to it from the defendant, upon open account, for one thousand dollars and upward, and praying an accounting and a decree of foreclosure of its lien upon his stock in default of payment. The lien is claimed to exist by virtue of section 4161b5 of 3 Howell's Statutes, which provides that the corporation shall at all times have a lien upon all the stock or property of its members invested therein for all debts due from them to such corporation. The bill was demurred to on two grounds: 1. That there was no jurisdiction in equity to enforce the lien; 2. That the remedy provided by 3 Howell's Statutes, sections 4161c3-4161c7, inclusive, is exclusive. The demurrer was sustained, and the bill dismissed. The complainant has appealed.

Upon the part of the defendant it is claimed: 1. That equity has no jurisdiction to enforce a sale of the property **164** to satisfy the statutory lien in a proceeding brought solely for that purpose; and 2. That, even if the court might do so when it had acquired jurisdiction for some other purpose within its jurisdiction, no such situation exists here. The theory upon which the bill seems to have been filed is that the lien of the complainant was akin to that of a mortgage or pledge of the stock, and carried with it a right to enforce payment of the debt secured by it, through foreclosure in a court of chancery, as well as by the notice and sale provided for by the statute to which allusion has been made.

This lien is not one which is created by direct agreement of the parties, such as a pledge or a mortgage, but arises by operation of law out of certain business relations, viz., that of corporation and stockholder. It is not in its nature an equitable lien, like the lien of a vendor of land sold upon contract for the purchase price. In such cases, under our practice, courts of equity have power to enforce the lien, upon bill practically for specific performance, to which the enforcement of the decree for the purchase price, by sale of the premises, is an incident: See *Fitzhugh v. Maxwell*, 34 Mich. 140; *Boehm v. Wood*, Turn. & R. 332. It is, on the contrary, a legal security, closely analogous to a common-law lien, which last is said not to be enforceable in equity. Indeed, in cases of common-law liens, which always involved possession of the chattel, actual or constructive (2 Kent's Commentaries, 639), the creditor had no right to sell the chattel for the purpose of obtaining compensation. The lien was defined to be "the right of detention, in persons who have bestowed labor

upon an article, or done some act in reference to it, and who have the right of detention till reimbursed for their expenditures and labor": *Oakes v. Moore*, 24 Me. 219, 41 Am. Dec. 379. As said by Chancellor Kent: "A lien is, in many cases, like a distress at common law, and gives the party detaining the chattel the right to hold it as a pledge or security for the debt, but not to sell it. It was said by Popham, C. J., in the *Hostler Case*, ¹⁶⁵ *Yel.* 66, that an innkeeper might have the horse of his guest appraised and sold after he had eaten as much as he was worth. But this was a mere extrajudicial dictum, and it was contrary to the law, as it has been previously and subsequently adjudged": 2 Kent's Commentaries, 642, and cases cited. See, also, 1 Jones on Liens, section 335, where the author, in discussing a carrier's lien, says that it, "like all other common-law liens founded upon possession, gives him [the holder] no right to sell the property, but only a right to retain it until his charges are paid." Again, in section 1033 the learned author says that "a common-law lien . . . is merely the right of a person in possession of the property of another to detain it until certain demands . . . are satisfied."

In *Doane v. Russell*, 3 Gray, 382, a wagon-maker sold a wagon, pursuant to notice to the owner, for the purpose of satisfying his lien, and the court held that he had no right to do so. In *Briggs v. Boston etc. R. R. Co.*, 6 Allen, 246, 83 Am. Dec. 626, a railroad company sold flour to pay their charges for its transportation, and it was held that they had "only a right to detain it until they were paid; not to sell it to obtain the remuneration to which they were entitled." In *Pothonier v. Dawson*, Holt N. P. 383, Chief Justice Gibbs said: "Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods." This was obiter, but nevertheless, from the eminence of the author, it is entitled to great weight. The doctrine was stated in *Jones v. Pearle*, 1 Strange, 556. Again, in *Lickbarrow v. Mason*, 6 East, 27, note, the rule was stated by Mr. Justice Buller as follows: "But he who has a lien only on goods has no right so to do [i. e., sell and dispose of them]; he can only retain them till the original price be paid." See, also, *Walter v. Smith*, 5 Barn. & Ald. 439, cited in *Doane v. Russell*, 3 Gray, 382, to the point that "a pledge as security for a debt . . . is a lien with a power of sale superadded." Chief Justice Shaw also cites *Cortelyou v. Lansing*, 2 Caines Cas. 200; 1 Chitty's General Practice, 492; Cross on the Law of ¹⁶⁶ Lien and Stoppage in Transit, 47; Woolrych on Commercial and Mercantile Law, 237. In *Briggs v. Boston etc. R. R. Co.*, 6 Allen, 246, 83 Am. Dec. 626,

Merrick, J., said: "And the rule, which is now well established, that a party having a lien only, without a power of sale super-added by special agreement, cannot lawfully sell the chattel for his reimbursement, is as applicable to carriers as it is to all others having the like claim upon property in their possession." While the doctrine of these cases—i, e., that the creditor cannot sell the property—is indisputable, there was no impediment to the recovery of judgment and sale of the property, as well as any other property of the debtor, on execution: *Tete v. Bank*, 4 Brewst. 308; *Buffalo etc. R. R. Co. v. Dudley*, 14 N. Y. 336.

Does it follow that a common-law lien can be foreclosed in equity because it does not confer upon the creditor the right to sell the property? It is evident that, in cases of common-law lien for a liquidated claim, a judgment and execution are as expeditious and effective as a proceeding in equity would be likely to be, and an application of the familiar doctrine that equity will not intervene when there is an adequate remedy at law would seem proper. It is a significant fact that we are not cited to any well-settled line of authorities that supports the practice of foreclosing common-law liens in equity. At the same time, Chancellor Kent, in discussing the subject, says: "I presume that satisfaction of a lien may be enforced by a bill in chancery": 2 Kent's Commentaries, 642. He supports the statement by no authorities, however. And in *Tete v. Bank*, 4 Brewst. 308, there is a dictum that in proper cases the creditor may invoke the aid of a court of equity to work out a sale. The lien with which we have to do is not a common-law lien, but is statutory. It has the attributes of a common-law lien, however, although the manual possession of the certificates of stock is not with the complainant. Inasmuch as a transfer of the stock must be upon the books, it may be urged that the corporation has constructive possession. But it is not of much importance whether it has possession or not. ¹⁶⁷ Statutory liens often exist although the creditor has not possession of the property; and we know of no authority that treats the matter of possession as depriving statutory liens of the legal attributes of common-law liens, to which they are analogous. Jones (1 Jones on Liens, sec. 104), says that "a statutory lien without possession may, by force of the statute, have the same operation and efficacy that a common-law lien has with possession": See 1 Jones on Liens, sec. 112; *Beall v. White*, 94 U. S. 382.

In the case of *Southern Michigan etc. Lumber Co. v. McDonald*, 57 Mich. 292, Cooley, C. J., said that "log labor liens

[which are statutory] could give no jurisdiction to a court of equity. If valid, they were legal claims." In *Thames Iron Works Co. v. Patent Derrick Co.*, 1 Johns. & H. 93, 97, the jurisdiction of equity to enforce by sale a builder's lien upon a vessel was denied; and in answer to the claim of exigency, alleged to arise from the expense of retaining the chattel, and the consequent necessity to make the security effectual by annexing to the passive lien the active right of sale, Mr. Vice-Chancellor Wood said that "if, in a matter of this magnitude, the court should for the first time in 1860 establish such a new right as, between persons dealing with chattels, it would injure rather than promote commercial interests." See *Canal Co. v. Gordon*, 6 Wall. 561, where the federal supreme court held that the jurisdiction to enforce a statutory lien "rests upon the statute, and can extend no further."

In 23 *American & English Encyclopedia of Law*, 697, it is said: "The lien is most frequently enforced by the refusal of the corporation to register transfers from an indebted member"; citing many cases. It adds that other methods of enforcement are foreclosure and sale and attachment. Few authorities are cited, and these will be discussed later, 1 *Cook on Stock and Stockholders*, sec. 530, cites the same. But, when we search for cases where statutory or common-law liens have been foreclosed in equity upon bills filed for the purpose, we find few, though it is probable that the ¹⁶⁸ states of Alabama, Kentucky, Illinois, and Maryland would sustain the practice. In *Westmoreland v. Foster*, 60 Ala. 448, a bill was filed against a tenant to enforce a lien for rent, against cotton in the hands of a vendee of the tenant. It was there held that a statutory lien, which is an incident of some contract made, is enforceable by the common processes of the law. This case proceeded upon the theory of a trust. *Tutwiler v. Tuskaloosa etc. Land Co.*, 89 Ala. 391, was a case where the stockholder filed a bill to enjoin a sale of his stock on account of a failure to pay calls, and to have the affairs of the corporation settled, and an account stated. A demurrer was sustained, and the complainant appealed. The case was affirmed, and the court seems to have held that the lien on the stock could have been foreclosed in chancery, citing *Westmoreland v. Foster*, 60 Ala. 448, as authority. This case was followed by *Crass v. Memphis etc. R. R. Co.*, 96 Ala. 447. A bill was filed to enforce a common carrier's lien, and to require the defendants to interplead as to the ownership of the property which was in the carrier's possession. The court said that it had no doubt that a court of chancery had jurisdiction to en-

force the lien, again citing *Westmoreland v. Foster*, 60 Ala. 448, and the authority quoted from Kent. It is fair to say that, while each of these cases alleges some other ground of jurisdiction than the mere foreclosure of a lien, the latter case indicates that a bill filed for foreclosure only would be sustained.

In *Kenton Ins. Co. v. Bowman*, 84 Ky. 430, a suit was brought to foreclose a mortgage on the property of the wife of Shinkle to the complainant. Shinkle held stock in the complainant company, and by an amended petition the complainant claimed a lien on that stock to secure this mortgage debt, or any part which should remain unsatisfied by the foreclosure of the mortgage. A decree of foreclosure was granted. In *Brent v. Bank of Washington*, 10 Pet. 596, executors of a deceased stockholder filed a bill to compel a transfer of stock for the benefit of the United States, it having been assigned by the testator as security for a debt ¹⁶⁹ due to the government. Counsel stipulated that, in case it was found that the bank had a lien upon the stock, the court might decree that the stock should be sold to satisfy it, which it did. In *Bank of Kentucky v. Bonnie* (Ky., Dec. 2, 1897), 43 S. W. Rep. 407, an action was brought to enforce a lien upon collaterals held in pledge by a bank, and also to enforce a statutory lien upon the stock of the debtor. It does not appear that the right to decree sale was questioned. In *National Bank v. Rochester Tumbler Co.*, 172 Pa. St. 614, a bill was filed to compel a transfer of stock to a pledgee. The tumbler company filed a cross-bill to enforce its lien, which was sustained, and the stock was sold to satisfy it. In the *Farmers' Bank of Maryland Case*, 2 Bland, 394, an administrator filed a bill to compel the bank to apply stock dividends upon indebtedness due the bank from the intestate, and to sell the stock and apply the proceeds, and that only the deficiency after such application of dividends and sale of stock should be admitted as a claim against the estate.

It will be seen from the foregoing that, in nearly all of these cases, jurisdiction might have been sustained upon other grounds than that of foreclosure, and that the court might, therefore, in order to do justice between the parties, have allowed a sale of the stock. Such was the case in *Kenton Ins. Co. v. Bowman*, 84 Ky. 430. The later case of *German Nat. Bank v. Trust Co.* (Ky., April 24, 1897), 40 S. W. Rep. 458, was a simple foreclosure bill, and sustains the practice on the authority of *Kenton Ins. Co. v. Bowman*, 84 Ky. 430. We have already seen that a similar course of decision is found in Alabama,

the doctrine being based upon cases which were distinguishable. In Maryland the earlier case was not a foreclosure bill, but was a bill filed against the bank to compel an accounting and transfer of stock, on which the bank claimed a lien. In the opinion the lien was treated as a mortgage, and it is intimated that it might be foreclosed. Ultimately, the stock was sold. The subsequent case of *Reese v. Bank of Commerce*, 14 Md. 271, 74 Am. Dec. 536, permitted a foreclosure of a lien on stock. In *Brent v. Bank*, ¹⁷⁰ 10 Pet. 596 the decree may be ascribed to stipulation, notwithstanding the fact that the bill was filed to compel a transfer. In *Bank of Kentucky v. Bonnie* (Ky., Dec. 2, 1897), 43 S. W. Rep. 407, the bill was filed to foreclose a statutory lien in conjunction with a mortgage on other property. In *National Bank v. Tumbler Co.*, a bill was filed to compel a transfer; while in *In re Morrison*, 10 Nat. Bank. Reg. 105, Fed. Cas. No. 9,839, the sale was under bankruptcy jurisdiction. In the case of *Cairo etc. R. R. Co. v. Fackney*, 78 Ill. 116, in an action of assumpsit, broad language was used as to the jurisdiction of equity in the enforcement of statutory liens, but it must be remembered that the lien involved there was a lien against a railroad.

We have yet to notice our own case of *Citizens' State Bank of Monroeville v. Kalamazoo County Bank*, 111 Mich. 313, where stock was sold and proceeds applied upon a lien. This question was not discussed, and the decree was made upon a cross-bill, where the original bill was filed to compel a transfer of stock. The court had jurisdiction for another purpose, and, having jurisdiction for one purpose, was justified in doing complete justice between the parties.

It is manifest that there is confusion in the law upon this subject. If it is true that equity has jurisdiction to enforce payment by foreclosure in all cases of statutory liens, it must be because of a difference between them and common-law liens, which we have not been able to discover, or because of the force to be accorded to authorities comparatively modern, few of which are cases of foreclosure merely. If that is the rule, it will be hard to distinguish the present case from any other lien for labor, carriage, or storage. The log lien, which has been discussed, would be no exception; for, if chancery has a general jurisdiction to enforce liens, it is not lost by the addition of a statutory method of relief. Authorities are numerous in support of this proposition. So that, to our mind, the authorities if there are such, that hold the statutory remedies are exclusive,

recognize the want of ¹⁷¹ jurisdiction in equity. We are of the opinion that resort to equity is neither necessary nor permissible in the majority of lien cases, and that the courts of law can deal with them cheaply and expeditiously. On the other hand, we have no doubt that equity, having jurisdiction for other purposes, may order sales of property for the satisfaction of liens, as was done in our own case already cited.

It is contended that such jurisdiction is shown by the bill in this case, but we think not. It seems to be a foreclosure bill simply. It is urged that an accounting is necessary; but we think the bill does not show that complainant's claim is not one that a court of law can deal with as well as any other case of open account. We see no opportunity for a multiplicity of suits, and the bill does not show that for any reason the remedy by judgment and execution is not adequate.

Counsel urge that they should have been given an opportunity to amend, and the bill should not have been dismissed peremptorily. Under the case of *Lamb v. Jeffrey*, 41 Mich. 719, the complainant should have been given an opportunity to amend its bill, if it desired it. We cannot assume that it did, and the record does not show that it asked it, so far as we are advised.

We must affirm the decree, with costs.

Grant, C. J., Moore and Long, JJ., concurred. Montgomery, J., did not sit.

Jurisdiction of Equity to Enforce Liens.

An equitable lien arises either from a written contract which shows an intention to charge some particular property with a debt or obligation, or is implied and declared by a court of equity out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings. It is settled beyond question that a court of equity is the appropriate tribunal for the enforcement of an equitable, as distinguished from a statutory or common-law, lien: *Vallette v. Whitewater Valley Canal Co.*, 4 McLean, 192; *Rigely v. Inglehart*, 3 Bland, 540; *Tolly Mfg. Co. v. New Chester Water Co.*, 48 Fed. Rep. 879; *Walker v. Casgrain*, 101 Mich. 604; *Smith v. Jackman*, 115 Mich. 192; *Buchan v. Sumner*, 2 Barb. Ch. 165, 47 Am. Dec. 165. "In equity there is no difficulty in enforcing a lien or any other equitable claim constituting a charge in rem, not only against real estate, but upon personal estate, or upon money in the hands of a third person, whenever the lien or other claim is a matter of agreement against the party himself and his personal representatives, and against every person claiming under him, voluntarily or with notice. Every such agreement for a lien or charge in rem constitutes a trust, and is, accordingly, governed by the general doctrine applicable to trusts": *Fletcher v. Morey*, 2 Story, 555, 565.

A court of chancery may enforce an equitable lien on either an equitable or legal estate in lands, and if the law creates a lien upon a legal interest in realty, a similar lien may sometimes be declared and enforced in chancery upon equitable estates by analogy, but equity cannot extend a purely legal lien created by statute upon estates purely legal to cases not provided by statute, and of the latter class is a judgment lien: *Buchan v. Sumner*, 2 Barb. Ch. 165, 47 Am. Dec. 305. Chancery is the proper forum in which to enforce a lien on lands arising under a devise securing a legacy: *Smith v. Jackman*, 115 Mich. 192; or creating a trust for the payment of debts: *Clift v. Moses*, 116 N. Y. 144. A court of equity has jurisdiction of an action for the specific performance of a contract and for the enforcement of a lien upon real property conveyed by an administratrix of a deceased partner to a surviving partner, under a written agreement of settlement between them, approved by the probate court, and by the terms of which it is agreed that the surviving partner shall assume and pay the notes of the firm to a bank, which indebtedness is made a lien upon the property conveyed, and it is immaterial to the jurisdiction of equity whether the action for specific performance of the agreement could be maintained alone or not: *Kreling v. Kreling*, 118 Cal. 413. Lands, but not claims to lands, may be sold by a court of equity to discharge liens: *Blight v. Banks*, 6 T. B. Mon. 192, 17 Am. Dec. 136. And if parties stipulate the mode by which a certain amount to be a lien on land shall be ascertained, equity has no jurisdiction to compel them to adopt another mode: *Emery v. Owings*, 7 Gill, 488, 48 Am. Dec. 580.

Although there is some confusion in the cases, the better rule as supported by the weight of authority is, that common-law, statutory, or legal liens are enforceable in courts of equity. In *Ford v. Sproule*, 2 A. K. Marsh. 528, 12 Am. Dec. 439, it is said that jurisdiction to enforce liens is concurrent in law and equity, and that, if resort is had to equity to enforce a legal lien, no greater relief should be allowed than could be obtained at law. And in *Cairo etc. R. R. Co. v. Fackney*, 78 Ill. 116, 120, it was said that "all liens are enforceable in equity unless the law has provided another mode. This is true of vendor's liens, equitable and other mortgages, and all statutory liens, so far as they now occur to us, except in all cases where the lien is in the nature of a pledge, and possession accompanies the lien."

In relation to mechanics' and materialmen's liens, it may be announced, as a general rule, that they are enforceable in equity. Thus, the foreclosure of a materialman's lien upon a vessel and the appointment of a receiver, being matters of an equitable nature, an action wherein such relief is sought is properly brought on the equity side of the court, and, in the absence of special statutory provisions regulating the proceedings in the foreclosure of such liens, it is within the power of the court, sitting in equity, to appoint a receiver to take charge of the property pending the proceedings: *Washington Iron Works v. Jensen*, 3 Wash. 584. But the jurisdiction of a court of equity invoked to enforce a statutory lien rests upon the statute, and can extend no further: *Canal Co. v. Gordon*, 6 Wall. 561. Under the Alabama statutes equity has jurisdiction.

to enforce the statutory lien of mechanics and materialmen, and if a materialman has obtained a judgment at law on his claim, and become the purchaser of the property at a sale under it, he may come into equity, against a prior mortgagee who has also become the purchaser of the property at a sale under his mortgage, to have the priorities of their respective liens adjusted and the property sold for their satisfaction: *Birmingham Bldg. etc. Assn. v. May etc. Co.*, 99 Ala. 276. If a lien upon land for improvements is claimed, and the property on which the lien is claimed is conveyed to an assignee for the benefit of creditors, and then, under an agreement between the assignee and the claimant, the property is sold by the assignee and the funds derived from the sale are, by the terms of the agreement, deposited in bank to await the adjudication of the rights of the claimant of the lien, a court of equity may entertain jurisdiction of a bill to determine the validity of the lien and reach the funds: *Lockett v. Robinson*, 31 Fla. 134. A court of equity is the proper forum to enforce the right of a purchaser to remove a building sold under a proceeding to enforce a mechanic's lien: *Otley v. Haviland*, 36 Miss. 19.

On the other hand, it has been decided that where a statute creates a specific mechanic's lien, and gives a specific remedy for the enforcement of such lien, a court of equity has no jurisdiction to enforce it, in the absence of some special ground of equitable interposition, such as renders the remedy at law unavailable or inadequate: *Walker v. Daimwood*, 80 Ala. 245; *Chandler v. Hanna*, 73 Ala. 390; *Coleman v. Freeman*, 3 Ga. 137.

A court of equity has jurisdiction to enforce liens on personal property generally, and may order the sale of a horse of an innkeeper's guest, to pay the charges for keeping, which constitute a lien: *Black v. Brennan*, 5 Dana, 310. Equity has jurisdiction of a bill to establish and enforce a bailee's lien on property in his possession which has been sold by the former owner, and where the bailee's right to a lien and to possession is denied by the vendee who is threatening to take forcible possession: *Knapp v. McCaffrey*, 178 Ill. 107, 69 Am.St. Rep.290. Equity has jurisdiction to enforce statutory liens whenever the statute provides no adequate method of enforcement: *Gilchrist v. Helena Hot Springs etc. Co.*, 58 Fed. Rep. 708. It has, however, been held that statutory liens cannot be aided or extended in equity. If they fail at law, they must also fail of enforcement in equity: *Douglas v. Huston*, 6 Ohio, 156; *Howe Sewing Machine Co. v. Miner*, 28 Kan. 441. In *Southern Michigan etc. Lumber Co. v. McDonald*, 57 Mich. 292-298, it was held that statutory log labor liens could give no jurisdiction to a court of equity. They are purely legal claims, which must be enforced at law.

The lien of a carrier for freight upon goods carried exists independent of any statute, and the remedy in equity for its enforcement is not affected by the statute providing an additional remedy: *Crass v. Memphis etc. R. R. Co.*, 96 Ala. 447. The landlord's statutory lien on the tenant's crop for rent exists independent of the remedy by attachment to enforce it, and passes by an assignment of the note given for such rent, and the assignee of such note may maintain a bill against the purchaser of the crop to foreclose his lien not-

withstanding his remedy at law: *Westmoreland v. Trousdale*, 60 Ala. 448. In several cases courts of equity have entertained a bill to enforce a statutory lien on the stock of a corporation: *National Bank v. Rochester Tumbler Co.*, 172 Pa. St. 614; *Reese v. Bank of Commerce*, 14 Md. 271, 74 Am. Dec. 536; *Tutwiler v. Tuscaloosa Coal etc. Co.*, 89 Ala. 391.

FEIGE v. BURT.

[118 MICHIGAN, 243.]

CORPORATIONS—STOCK—PLEDGE—CONVERSION.—A pledgee of corporate stock indorsed in blank may protect his special property therein by having the stock transferred on the books of the corporation and new stock issued in his name, but if he goes further and uses such stock as his own, denying the rights of the pledgor, he is guilty of a conversion.

EXECUTION.—CORPORATE STOCK pledged as collateral security and transferred on the books of the corporation to the pledgee cannot be sold on execution against the pledgor.

CORPORATIONS—STOCK—SALE UNDER EXECUTION.—The right to subject corporate stock to sale under execution being purely statutory, the provisions of the statute must be substantially observed.

CORPORATIONS—STOCK—PLEDGE—SALE WITHOUT NOTICE.—If corporate stock is pledged for the payment of a debt, it may, in case of default, be sold by the pledgee, without judicial proceedings, upon notice to the pledgor, but such sale without notice is a conversion of the stock.

CORPORATIONS—STOCK—PLEDGE—WRONGFUL SALE. If a pledgee of corporate stock illegally sells it, the pledgor may sue for its conversion, without tendering the debt or demanding a return of the stock. In such action the pledgee has the right to recoup the amount of the debt.

Weadock & Purcell, for the appellant.

Humphrey & Grant, for the appellees.

244 MOORE, J. Plaintiff sued defendants, in an action of trover, to recover the value of twenty certificates, representing eight hundred shares of stock in the Feige-Silsbee Furniture Manufacturing Company, claimed by him to have been unlawfully converted by defendants. The circuit judge directed a verdict in favor of defendants. Plaintiff has appealed the case to this court.

Prior to 1888 the plaintiff was one of the incorporators of the Feige-Silsbee Furniture Manufacturing Company, which name was changed, later, to the Feige Desk Company. He was a borrower of the defendant bank. November 8, 1888, he pledged to the bank the certificates of stock already mentioned, indorsing them in blank, and at the same time a paper was executed reciting the deposit of the certificates, "to be held by said

bank as collateral security for any obligation which I may now have or hereafter have" in said bank. May 1, 1895, Mr. Feige gave his note to the bank in the sum of six thousand six hundred and fifty dollars, due in three months. The defendant Burt became a stockholder in the furniture company some years ago. He was its president when this note was given, and continued to be its president from that time on. Mr. Feige was a director, and for some time had been manager, of the company. Mr. Burt was also president of the bank. It is the claim of the plaintiff that Mr. Burt and the bank conspired together to depreciate the value of the stock, and to deprive him of it without compensation, and to displace him from his position as director and manager of the company. He says on February 10, 1896, the bank, without notice to him, through its president, Mr. Burt, surrendered the twenty certificates of stock, and one certificate in lieu thereof was issued to the bank for the eight hundred shares, and the twenty certificates were canceled. He claims the certificate so issued was never returned to the furniture company. He says Mr. Burt, as president of the company, refused to recognize ²⁴⁵ him as a stockholder at the meeting of the stockholders of the company, in February, 1896; that he was then displaced as director and manager; that he was refused access to the books of the company; and that the secretary of the company and Mr. Burt declared he had no interest as a stockholder or otherwise in its affairs. He further claims that, in the annual report made to the secretary of state, it was reported the eight hundred shares of stock which had been previously represented as held by him were owned by the bank. He claims that what was done was done, not for the purpose of collecting the debt, but for the purpose of depriving him of his stock. It is the claim of Mr. Burt and of the bank that what they did was done in good faith; that, for the purpose of making the bank secure against possible levies by creditors, the bank had a right to surrender the certificates, and have one issued in its name; and that it did not claim to be the absolute owner of the stock as against plaintiff, but always recognized his right to it upon his payment of the debt to secure which it was turned out.

May 18, 1896, the bank obtained judgment upon the note given by Mr. Feige, and caused an execution to be issued and placed in the hands of a deputy sheriff, who served a copy of it upon the secretary of the company, who, on June 10, 1896, issued the following certificate:

"C. Dingman, Deputy Sheriff for Saginaw County, Mich.

"Dear Sir: You are hereby notified that, as appears by the books of the Feige Desk Company, of Saginaw, Michigan, a corporation, Ernest Feige is the owner of 800 shares of the capital stock of said company, of the par value of \$25 each, subject, however, to the interest therein as pledgee of the Home National Bank of East Saginaw, Michigan. Said stock is represented by certificate No. 100, issued February 10, 1896, to said Home National Bank.

"Yours truly,

"G. R. BURT,

"Sec. and Treas. of the Feige Desk Co."

240 As a matter of fact, the stock at this time stood upon the books of the company in the name of the bank. The stock was advertised and sold by the sheriff for four hundred dollars, and this amount was paid over to the bank. Before suit was brought, no tender was made of the debt and no demand made for the stock. It is the claim of plaintiff that what occurred in February amounted to a conversion of the stock, and that the court erred in refusing to submit to the jury the question of whether there had been a conversion or not.

Where stock is pledged to secure the payment of a debt, in default of payment the pledgee may not at once convert the stock to his own use, but he may give notice to the pledgor of an intent to sell the stock, and may so sell it, without any judicial proceedings, and apply the proceeds to the payment of the debt: 1 Cook on Stocks and Stockholders, sec. 476. A sale without a notice is a conversion of the stock; and, in the absence of any agreement, the sale must be at public auction.

It is the claim of defendants that there was no attempt to deprive plaintiff of his stock in February, and that the pledgee of shares of stock has a right to have the stock transferred, and new shares issued in his name, and that doing so does not amount to a conversion: Citing Colebrooke on Collateral Securities, sec. 288; Day v. Holmes, 103 Mass. 306; Heath v. Griswold, 18 Blatchf. 555; Heath v. Silverthorn etc. Smelting Co., 39 Wis. 146; Rich v. Boyce, 39 Md. 314; 1 Cook on Stocks and Stockholders, sec. 466. These authorities sustain the position of counsel; but it is the claim of plaintiff that defendants went further than this; that they used the stock as though it was the stock of the bank, and denied that plaintiff had any right in it or in the company. Plaintiff gave testimony tending to support his claim. We think there were sufficient facts shown so the question should have been submitted to the jury.

Was there a conversion by the levy upon and sale of the stock? A share of stock is in the nature of a chose in action, and at common law a chose in action could not be ²⁴⁷ reached by or made subject to a levy of execution. Consequently, it has been uniformly held by the courts that at common law a levy of execution could not be made on shares of stock: 1 Cook on Stocks and Stockholders, sec. 480; Van Norman v. Jackson Circuit Judge, 45 Mich. 204. As the levy upon execution is authorized only by virtue of the statute, its provisions must be substantially observed: 1 Cook on Stocks and Stockholders, sec. 482. 2 Howell's Statutes, section 7697, provides that any share or interest of a stockholder in any joint-stock company may be taken in execution. The next section provides that a copy of the execution shall be left with the person having the custody of the books and papers of the company. The next section reads: "The officer of the company who is appointed to keep a record or account of the shares or interest of the stockholders therein shall . . . be bound to give a certificate of the number of shares or amount of the interest held by such judgment debtor."

As we have already seen, none of the certificates of stock stood upon the books of the company in the name of Mr. Feige after February 10th. This was known to the secretary of the company, and to the bank; but, knowing this, the bank levied upon the stock as though it stood in his name, sold it, and took the avails of the sale. This sale cannot be justified as an execution sale by a creditor of Mr. Feige: Blair v. Compton, 33 Mich. 441; Van Norman v. Jackson Circuit Judge, 45 Mich. 208; Gypsum & Stucco Co. v. Kent Circuit Judge, 97 Mich. 631.

Can the sale be justified as a sale by the pledgee? We have already seen the sale cannot be made until notice has been given to the pledgor of the intention to sell. "A sale without a notice is a conversion of the stock": 1 Cook on Stocks and Stockholders, sec. 477. In Stearns v. Marsh, 4 Denio, 227, 47 Am. Dec. 248, it is held, if the pledgee sell the property, without calling on the pledgor to redeem, the latter may maintain an action for the value of the thing pledged, without tendering the debt, because ²⁴⁸ by the wrongful sale the pledgee has incapacitated himself to perform his part of the contract—that is, to return the pledge—and it would therefore be nugatory to make the tender: Citing Story on Bailments, sec. 349; M'Lean v. Walker, 10 Johns. 471. In such case the pledgee may recoup the amount of his debt.

The sale made was an unlawful sale, and amounted to a con-

version. The plaintiff was entitled to recover the value of the shares of stock, less the amount of the debt.

The judgment is reversed and a new trial granted.

Grant, C. J., Hooker and Long, JJ., concurred. Montgomery, J., did not sit.

PLEDGE—SALE—NOTICE.—A holder of collateral security cannot sell it without first giving notice to the pledgor: *Diller v. Brubaker*, 52 Pa. St. 498, 91 Am. Dec. 177; *Stearns v. Marsh*, 4 Denio, 227, 47 Am. Dec. 248; monographic note to *Griggs v. Day*, 32 Am. St. Rep. 730.

PLEDGE.—THE CONVERSION OF STOCKS by a pledgee is discussed in *Dimock v. United States Nat. Bank*, 55 N. J. L. 296, 39 Am. St. Rep. 643, and note.

EXECUTIONS.—THE INTEREST OF A PLEDGOR in goods in the hands of a pledgee can be reached under execution only by serving and enforcing a garnishment on the pledgee, and not by a seizure of the pledge: *Treadwell v. Davis*, 34 Cal. 601, 94 Am. Dec. 770.

CARLAND v. WESTERN UNION TELEGRAPH COMPANY.

[118 MICHIGAN, 369.]

PLEADING—JOINDER OF COUNTS.—A special count in *assumpsit* may be joined with the common counts.

TELEGRAPH COMPANIES—DAMAGES FOR FAILURE TO TRANSMIT MESSAGE.—*Assumpsit* may be maintained against a telegraph company to recover damages for its failure to transmit and deliver a message.

TELEGRAPH COMPANIES—RULES AND REGULATIONS—NOTICE TO SENDER.—The sender of a telegraphic message is not bound by the rules and regulations of the company of which he has no notice.

TELEGRAPH COMPANIES.—A TELEGRAPH OPERATOR IS THE AGENT of the company, and not of the sender, in receiving a message by telephone to be transmitted, if the sender is ignorant of a regulation of the company requiring all messages to be given to such agent in writing.

TELEGRAPH COMPANIES—CIPHER MESSAGES.—The meaning of a cipher telegram may be shown by the sender.

TELEGRAPH COMPANIES—NONDELIVERY OF MESSAGE.—A statement by a telegraph operator to the sender of a telegram that it has not been delivered, made as a report of his effort to trace it, is admissible in evidence to show nondelivery.

EVIDENCE—COMPETENCY.—TESTIMONY as to the price of goods in a certain market on a specified day by a person who testifies that he knew the fact, is competent to go to the jury in the absence of evidence that he did not know such fact.

CONTRACTS, GAMBLING—DEALING IN WHEAT.—In an action against a telegraph company to recover for its failure to deliver a message from a customer to his broker to buy him a cer-

tain amount of future wheat, which he testifies that he expected to actually receive and pay for, the transaction cannot be held, as a matter of law, to be void as involving a gambling contract.

J. T. McCurdy, for the appellant.

Watson & Chapman, for the appellee.

371 HOOKER, J. The plaintiff's action was brought to recover damages from the defendant for its failure to promptly transmit and deliver a telegram, whereby the plaintiff is said to have suffered a loss. The record contains testimony tending to show that the plaintiff, a merchant, residing at Corunna, called the office of the defendant at that place by telephone. Mr. Young, defendant's agent, responded, whereupon the plaintiff asked him to take a message, which he did. The message was as follows, viz.:

"Corunna, Mich., Jan. 25, 1898.

"To G. W. Wylie Company, 145 Van Buren Street, Chicago, Ill.

"Buy three May.

JOHN E. CARLAND."

It was intended to be understood to mean, "Buy 3,000 bushels of May wheat."

After waiting twenty-four hours without response to his message, the plaintiff called the defendant's office by telephone, and was answered by Mr. Reed, Young's assistant, who, in response to his inquiry, assured him that the message was sent. Twenty-four hours later the plaintiff called upon Young, who said he would trace the message, and he reported later that the message was never received at the Chicago office, and a duplicate of the message was sent on January 28th. The testimony tended to prove further that the price of wheat advanced meantime, and plaintiff's agent was obliged to pay a higher price than would have been necessary had the first message been sent promptly. A verdict was rendered in favor of the plaintiff, and the defendant has brought the case to this court by writ of error.

372 The action was commenced before a justice of the peace. The docket shows that: "Plaintiff declared orally on all matters provable under the common counts in assumpsit, and especially on a contract with said defendant, and files a written memorandum of said contract, and claims damages three hundred dollars or under.

"Written Memoranda of Plaintiff's Declaration Herein.

"Plaintiff says that heretofore, to wit, on the 25th day of January, A. D. 1898, said defendant was, and still is, a tele-

graph company and corporation engaged in the telegraph business, and a common carrier of telegraph messages. And on, to wit, the 25th day of January, 1898, said defendant undertook, for a valuable consideration, to wit, 40 cents, to convey and deliver for said plaintiff a telegraph message to G. W. Wylie & Co., No. 145 Van Buren street, Chicago, Ill., which message was as follows: 'Corunna, Mich., Jan. 25th, 1898. To G. W. Wylie & Co., 145 Van Buren Street, Chicago, Ill.: Buy three May. J. E. Carland,' which message instructed G. W. Wylie to purchase for said plaintiff 3,000 bushels of wheat, to be delivered to said plaintiff on May first. And said defendant, by its contract with said plaintiff, owed said plaintiff a duty to deliver said telegram promptly and without unnecessary delay. But, notwithstanding such contract and duty, said defendant wholly failed to deliver said telegram in any manner, and wholly failed and neglected so to do, and, on account of such failure and neglect of said defendant, said plaintiff was deprived of and lost large gain and profits on said wheat which the said George W. Wylie would have purchased for this plaintiff, and said plaintiff was deprived of the opportunity of purchasing said wheat on said 25th day of January, 1898, and on account of which said plaintiff has been damaged in the sum of \$300, for the recovery of which this suit is brought.

J. E. CARLAND."

Several assignments of error relate to the declaration, it being claimed that it does not state a cause of action; that there is a misjoinder of counts; that the ad damnum clause, being three hundred dollars, was fatal to the jurisdiction of the justice; and that, if none of these points are valid, the court should have compelled an election of counts.

373 It is manifest from the record that the plaintiff did not recover upon the common counts, and that, there being nothing in the case that tended to support them, they were practically abandoned, and an election would have been an empty form.

The special count appears to have been intended as a count in assumpsit for the breach of a contract, and not a count in case for a negligent injury in the nature of a tort: See *Tiffany's Justice's Guide*, Howell's 5th ed., 183. It follows that, being a count in assumpsit, it was properly joined with the common counts, as "all causes of actions enforceable in assumpsit may be joined": 1 Ency. of *Pr.* & Pr. 169.

But it is contended that there can be no recovery in assumpsit in such cases, and that the action must be case for a breach of

duty, and not assumpsit for breach of contract. Counsel says that the "gist of these actions is negligence," quoting the language of Mr. Justice Grant in *Birkett v. Western Union Tel. Co.*, 103 Mich. 367, 50 Am. St. Rep. 374. We think counsel has misinterpreted this language, and that there is nothing in that case which compels one having contract relations with a telegraph company to forego an action of assumpsit upon breach of the contract, and resort to an action ex delicto. It was true that negligence was the gist of that action, because the conditions which were made a part of the contract made it essential to recovery. In this case the plaintiff's claim is that the usual conditions are not a part of the contract. "Where the sender can show that, through the negligence of the company in transmitting or delivering a message, he has suffered a legal injury, there can be no question as to his right to sue for damages; and this whether the right of action be regarded as resting in contract or in tort for the breach of public duty": 25 Am. & Eng. Ency. of Law, 824; Gray on Communication by Telegraph, sec. 64; *Playford v. Telegraph Co.*, L. R. 4 Q. B. 706; 10 Best & S. 759.

Again: "The action is properly one ex contractu, and based on ³⁷⁴ the contract of sending": 25 Am. & Eng. Ency. of Law, 830.

In the case of *Western Union Tel. Co. v. Carew*, 15 Mich. 525, cited by counsel, the action was assumpsit, and, though the case was reversed, the court seems to have recognized the propriety of the form of action by ordering a new trial. There may be cases where an action upon contract would not be appropriate, as where the plaintiff was not a party to the contract. In actions brought by the person to whom the message is addressed, some of the courts so hold. This is so in England, where the rule is strictly enforced; but in this country there is a want of harmony upon the subject: See 25 Am. & Eng. Ency. of Law, 824.

This also disposes of the jurisdictional question, as the statute (2 Howell's Statutes, sec. 6814) confers concurrent jurisdiction upon justices of the peace in all civil actions upon contract where the debt or damages do not exceed three hundred dollars. The declaration was entitled to the liberal treatment which the courts accord to pleadings in justice's court, and sufficiently set forth the alleged contract and its breach to apprise the defendant of the plaintiff's claim. This also disposes of the objection made to the introduction of the depositions.

A number of questions relate to the alleged contract. It is contended that the contract to send the message was subject to the conditions which the defendant usually imposes upon its patrons; that Young was, by the plaintiff, made his agent to write the telegram upon the blank containing the conditions; and that receiving a message upon any other terms than such conditions would be outside of the scope of Young's authority. Young, being the person in charge of the defendant's business, and authorized to receive telegrams, was acting within the general scope of his authority in so doing, and the plaintiff was not bound, at his peril, to ascertain the secret instructions that the defendant had given in relation thereto. In Maryland, some recognition has been given to the defendant's contention ³⁷⁵ by cases which hold that the sender of a message must be supposed to be informed in regard to the rules and regulations of the telegraph company; but the weight of authority is to the contrary: See Thompson on Elections, secs. 211, 212, for a discussion of this subject; also, 25 Am. & Eng. Ency. of Law, 804; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181. But, while this is true, if the plaintiff had knowledge of the rules and regulations under which the defendant did business, he would be bound by them so far as they were valid and binding upon others, and it was a question for a jury to determine whether he had such knowledge or not, if a question in the case.

Should it be said that Young, in receiving by telephone and writing such message, was the agent of the plaintiff? We are cited to several cases holding that the operator is such agent, under somewhat similar circumstances. Thus, in the case of *Western Union Tel. Co. v. Edsall*, 63 Tex. 677, where, at the request of the sender of the message, it was written by the operator upon a blank of the company, which the sender signed, it was held that the operator was, as to that message and its preparation, the agent of the sender. The court said: "Evidently the operator, in the preparation of the message, was acting for the appellee, and not the company. True, he was the agent of the company to receive and forward messages, but not to write messages for others." This case was followed in the case of *Western Union Tel. Co. v. Foster*, 64 Tex. 220, 53 Am. Rep. 754. In that case the sender wrote the message, and, upon its being read over by the clerk, he (the sender) detected a mistake in it, and the clerk undertook to correct it by an interlineation, which he made in a wrong place. The court held that he was not acting within the scope of his authority, and was the agent

of the sender. In a still later case the Texas court of civil appeals has sustained this doctrine: See *Gulf etc. R. R. Co. v. Geer*, 5 Tex. Civ. App. 349. The original message, written upon a piece of brown paper, was rejected by the operator as ³⁷⁶ unintelligible, and by him handed back to the person sent by the plaintiff to deliver the same. Plaintiff's messenger stated to the operator that he was hot and nervous, and asked the operator to write down the message. He wrote it on a telegraphic blank, as dictated, and sent it. It was held that the operator, in the preparation of the message, was acting for the sender, and not the company, and that the plaintiff could not, therefore, complain of his act in writing the message upon the form commonly used for the purpose, and that the conditions upon the blank were binding upon the sender.

It seems to us that in the cases cited the Texas court went too far if it took judicial notice that the scope of the agent's authority did not permit him to write messages for those desiring to send them, who, from infirmity, were incapacitated from writing the same, or were, from ignorance, unable to do so. The law does not forbid such authority, nor does it make it the duty of the sender to write the message. If the rules of the company forbade it, there is nothing in the case to show that the fact was brought home to the knowledge of the patron, and the rule would have no greater force than any other of which he was ignorant. We cannot conclude, in the absence of proof, that the telegraph companies expect their operators to turn away patrons who cannot write, or that they keep telephones in the office, but do not permit their use in their business by their patrons who send and receive messages. And we are of the opinion that such use should not be altogether at the peril of the patron, or that he should suffer for mistakes made at either end of the line, merely because such are the instructions to the operator, or made the subject of a rule of which the patron has no knowledge. It would seem more reasonable to hold such acts to be within the general scope of his authority, or, at least, hold it to be a question for a jury. There is sufficient justification for the decision in *Western Union Tel. Co. v. Edsall*, 63 Tex. 677, without invoking such a rule, for the sender signed the message upon the blank, thus making it his own, under ³⁷⁷ the current weight of authority that so holds, although the conditions be not read: 25 Am. & Eng. Ency. of Law, 805, and cases cited in note 1. So, in the case of *Gulf etc. R. R. Co. v. Geer*, 5 Tex. Civ. App. 349, the message was written upon the

blank by request. The case of *Western Union Tel. Co. v. Foster*, 64 Tex. 220, 53 Am. Rep. 754, more nearly sustains defendant's contention. We are cited to no authorities in support of the Texas cases. We are of the opinion, therefore, that the court committed no error in holding that Mr. Young acted as agent for the defendant, under the proofs contained in the record, and might properly have instructed the jury that he was not shown to have acted as agent for the plaintiff.

It is urged that the court erred in permitting the plaintiff to testify to the meaning of the words used in the dispatch, viz., "Buy three May." Counsel cites some authorities supporting the doctrine that such evidence is not admissible where the statute of frauds has application; but no such question is raised here. There was no contract with the Wylie company; merely a request to purchase something. If the language had a secret meaning, it was proper to show the fact. Ciphers play an important part in business affairs, and we see no reason why they are not as proper subjects for translation as foreign languages.

The defendant asserts further that there was no competent evidence that the telegram was not delivered. Young stated such fact to the plaintiff before sending the duplicate message, and we think this was an act within the scope of his authority, and a part of this transaction. As it is not in any way contradicted, it is unnecessary to inquire whether the testimony of the Chicago witnesses upon the same subject was admissible or not.

We are of the opinion that the court did not err in leaving the question of the price of wheat at Chicago to the jury. The plaintiff testified that he knew what it was, and his cross-examination did not show that he had no knowledge upon the subject.

It is contended further that this telegram was sent in ³⁷⁸ furtherance of a gambling contract, which would have been void under the statute, and that damages for a failure to deliver it cannot be recovered. 3 Howell's Statutes, section 9354f, prohibits the purchase and sale of grain, etc., on margins for future or optional delivery, without any intention of receiving or paying for the property so bought or sold. If this claim were conclusively proved, so that we could find the fact as alleged, we should have no doubt that the plaintiff's action must fail; but this is a disputed fact. The plaintiff testified that such an arrangement was not contemplated, and that he expected to pay for and receive the grain. We have no occasion to express our opinion of the matter. There was evidence for the jury, and

the responsibility of justly determining this fact was theirs. Every contract for a future delivery of grain is not a gambling contract. It is only when the parties mutually understand it to be such, and no actual sale or purchase or contemplated delivery is involved, and where the one is to pay and the other receive the amount of fluctuations in the market, that this statute applies. It is the pretended, and not the actual, buying and selling of grain, etc., that is prohibited. An extended discussion of this subject will be found in 8 American and English Encyclopedia of Law, 1005 et seq. The subject is also fully discussed by Mr. Justice Marston in *Gregory v. Wendell*, 39 Mich. 338, 33 Am. Rep. 390, and later, upon another review of the same case, by Mr. Justice Cooley: See *Gregory v. Wendell*, 40 Mich. 435.

The judgment is affirmed.

The other justices concurred.

TELEGRAPH COMPANIES—RULES, WHEN NOT BINDING.—

A rule adopted by a telegraph company regulating its relations with its patrons, is not binding upon them without their assent, although they have knowledge thereof: *Webbe v. Western Union Tel. Co.*, 169 Ill. 610, 61 Am. St. Rep. 207, and see extended note thereto. Rules and conditions contained in printed contracts of telegraph companies must be construed most strongly against them: *Western Union Tel. Co. v. Moore*, 12 Ind. App. 136, 54 Am. St. Rep. 515.

TELEGRAPH COMPANIES—FAILURE TO TRANSMIT MESSAGE.—An action ex contractu for damages arising from failure to transmit a telegraphic message was maintained in *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519.

TELEGRAPH COMPANIES—EVIDENCE.—In an action for damages resulting from delay in sending a message the reply of the operator at the terminal office in response to the inquiry of the sender why the message had not been delivered, is not admissible in evidence against the company: *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148.

WAGERING CONTRACTS—DEALING IN FUTURES.—To render a contract for the sale of goods to be delivered in the future void as a wagering contract, it is not enough that one party only intended a speculation in prices; it must be shown that both parties did not intend a delivery of the subject matter, but contemplated and intended only a settlement of the difference between the contract and the market price: *Crawford v. Spencer*, 92 Mo. 498, 1 Am. St. Rep. 745, and see monographic note thereto discussing wagering contracts in general.

TELEGRAPH COMPANIES—DELAY IN DELIVERY OF MESSAGE RELATING TO "FUTURES."—A telegraph company cannot escape liability for negligent delay in delivering a message on the ground that it relates to sales of "futures," unless it is made a crime or tort to speculate in "futures," or would submit the company to indictment or civil action to receive and transmit such message: *Gray v. Western Union Tel. Co.* 87 Ga. 350, 27 Am. St. Rep. 259.

STEPHENSON v. BOARDS OF ELECTION COMMISSIONERS.

[118 MICHIGAN, 396.]

CONVENTIONS, POLITICAL — QUALIFICATIONS OF MEMBERS.—A political convention is the sole judge of the qualifications of its members, and its decision is final.

CONVENTIONS, POLITICAL—TEMPORARY ORGANIZATION.—A chairman of a political committee, who calls a convention to order, has no power to determine the right of contesting delegates to vote on the organization of the convention against the will of the assembly, although he is acting under direction of a majority of the committee of which he is chairman.

CONVENTIONS, POLITICAL.—If rival factions of a regularly called convention of a party nominate and certify different tickets, neither the election commissioners nor the courts have authority to determine that the candidates of one or the other of the two factions are regularly nominated and entitled to a place upon the ballot to the exclusion of the other, unless such authority is conferred by statute expressly, or by necessary implication.

ELECTIONS—TICKETS OF RIVAL FACTIONS.—Both tickets nominated and certified by rival factions of a regularly called political convention are entitled to a place on the official ballot in separate columns, one with the general ticket and the other in the next column under the party name and vignette. The election commissioners may decide the set of nominees to occupy the different columns.

Brown & Trudell, H. O. Young, B. S. Waite, and F. A. Baker, for the relator.

G. Hayden, G. Smith, H. H. Hatch, H. Geer, A. C. Cook, and J. H. Cole, for the respondents.

397 HOOKER, J. The relator asks a mandamus to compel the several boards of election commissioners of the twelfth congressional district to place the name of the relator upon the Republican tickets throughout the district as candidate for Congress, to the exclusion of the name of Carlos D. Shelden, each claiming to be the nominee of the regularly called convention of the Republican party. The record shows that a congressional convention was called and the delegates assembled. It is admitted to have been a regularly called convention, and therefore its nominee, if ascertainable, is lawfully entitled to have his name printed upon the ticket.

At the appointed time a large number of persons assembled. Previous to its meeting, George A. Newett, the chairman of the congressional committee, assembled his committee, which, by a vote of three for and two against the proposition, decided that the committee should ascertain in advance what persons were

lawful delegates from those counties where there were contesting delegations, and that such persons, and such only, should be permitted to participate in the preliminary work of organizing the convention. For the purposes of this opinion it is sufficient to say that two counties—Dickinson and Marquette—had contesting delegations, and it appears to be admitted that, leaving these counties out, there were thirty-five delegates who favored the nomination of Mr. Sheldon, and thirty-one who supported the relator. Here, then, was one assembly, in which eighty-seven delegates were entitled to seats, and there were sixty-six present who are conceded to have been entitled to seats. The chairman of the committee called the convention to order, and, while reading or about to read the call for the convention, a delegate whose right to a seat was unquestioned arose and said, "I nominate Chase Osborn for chairman," and himself put the question, and declared it carried; whereupon Osborn, also a delegate whose right to a seat is undisputed, appeared upon the platform, and attempted to preside over the convention; and, as appears by the proceedings of the convention set up in the return ³⁹⁸ of the respondents and affidavits accompanying the same, the business was proceeded with, credentials examined and passed upon, and Carlos D. Sheldon nominated, when the convention, or that portion which had not declined to take part in these proceedings, adjourned sine die, and its members left the hall. Meantime, Mr. Newett, who occupied the same stage, had been elected chairman by a faction of the assembly, a secretary chosen, and committee on credentials appointed, who, after the lapse of a couple of hours, and therefore after the adjournment of the other faction, made a report seating delegations favorable to the relator, and, this being adopted, this faction nominated the relator, and adjourned sine die. The officers of each faction filed certificates of nomination with the several boards of election commissioners, and, while we do not find it explicitly so stated, it is perhaps inferable that in some cases these boards refuse to place relator's name upon the ballot, and that others are disposed to do so, to the exclusion of Mr. Sheldon.

The relator contends that it was the right and duty of the chairman, acting under the direction of a majority of the committee, to preside over the assembly until the convention should be organized, and to determine who were entitled to vote in effecting such organization, and that the organization of a meeting through the election of Mr. Osborn as chairman was irreg-

ular and void, and that the organization perfected by the other faction was the only valid organization, and therefore the only "regularly called convention" whose nominee the law permits to have a place upon the ballot. Political conventions are deliberative bodies, supposed to be made up of representatives of a political party, who assemble at the appointed time and place for the purpose of holding the convention. The delegates usually come armed with something in the nature of credentials which tend to show that they are there by authority; and it has usually been supposed that the assembly itself passes upon the authenticity and sufficiency of such credentials, and it has been quite common ³⁹⁹ for conventions to admit bystanders from an unrepresented district to seats as representatives of their locality, although without other authority. While it has doubtless been the common practice for chairmen of political committees to use the gavel to procure order and silence, to read the call, and then to ask the assembly its further will or pleasure, and put motions until a temporary chairman is chosen, we have not understood it to be the province of the chairman to do more, or so much even, if against the will of the assembly. Certainly, we know of no rule of law authorizing it. The assembly is a law unto itself, and has uniformly been the judge of the qualification of its own members, and its decision final.

The contention of the relator seems to be based upon the assumption that the assembly cannot be trusted to faithfully discharge the duty of sifting out the disqualified, and that for that reason there must be some outside authority which shall have power to determine what individual members of the assembly are *prima facie* authorized delegates, and what are not, to the end that the convention shall be legally organized, and the claim that party custom has conferred that power upon the committee. It is said that outsiders may capture the convention under any other rule, or that enough contesting delegates may be sent to control the assembly, thus frustrating the will and thwarting the intentions of the constituency. To this the opposition retorts that the relator's theory is a still better scheme for perpetrating fraud and thwarting the popular will, placing it within the power of a majority of a committee to recognize the partisans of a particular candidate to an extent sufficient to control the organization and the seating of delegates, thereby making his nomination sure and the convention a farce. These difficulties do not now present themselves for the first time. From our earliest recollection party politics has

always been a matter of shrewdness and management, not always defensible; yet the people have been left to deal with the difficulties as they arise. It is not to be supposed that committees ⁴⁰⁰ on credentials, however fairly selected, have always dealt justly; and, no doubt, expediency or political exigency has governed their action, to the exclusion of abstract justice. The remedy has usually been either a bolt on the part of the dissatisfied, and the selection of an opposition candidate within the party, or a refusal by the electors to support the nominee, and the courts have been careful not to interfere with the application of these remedies, which have usually been found adequate.

Nothing is more certain than that, when this assembly met, it constituted what the law calls "a regularly called convention"; and, had there been no split, the right of its nominee to a place upon the ticket could not have been successfully questioned upon the ground that it was organized upon the motion of Hambitzer, instead of under the leadership of Newett. But it did split; and we must do one of two things, viz., either follow the precedents, and say that we will not decide between the rival factions, or ourselves decide who were the lawfully elected delegates to the convention. To do this, we might be called upon to investigate every ward or township caucus and county convention held in the two disputed counties, and, had either side asked it, throughout the district. We have intimated that the assembly is the judge of the qualification of its members, and that back of its decision we cannot go. Its presiding officer is its creature, and it must protect itself. In turn, its voters must protect themselves against fraud upon their convention or misconduct of its delegates, officers, and candidates; and when a considerable faction of a convention leaves the meeting, and nominates a ticket, claiming to be the representative of the party which called the convention, it is not the province of the courts to determine upon technical grounds that it is not, and that its action is void, and deny it a place upon the ballot, thereby defeating the purification of methods within the party, or to say which faction was right and which wrong. It is a right of the voter to repudiate wrong and corruption and fraud, if it exists, and to prevent, ⁴⁰¹ or unearth and defeat, corruption, and he should not be hampered by technical rules. If in this case this convention was unable to conclude its business in harmony, and the delegates divided and made two nominations, they should not be denied the privilege of going to the polls with both. Each nominee is here contending that he represents

the only pure Republicanism of the district, and is the lawful nominee of the true party. The electors must decide between them. In such case we know of no way of determining which of these names ought of right to go upon the Republican ticket. If it were left to the voters, there would doubtless be an honest difference of opinion upon the merits of the question. The same may be true of the boards. They may not know what they should do, and we cannot tell them further than to say that, under the admitted facts and the precedents, both are entitled to places upon the ballot.

It has been held in this state that, where rival factions of a regularly called convention of a party nominate and certify different tickets, the election commissioners have no authority to accept one, to the exclusion of the other; and it was held, further, that, under such circumstances, both tickets should be printed upon the ballots; and it was said in that connection that the name of the party as certified should be placed above the ticket, without further addition or distinctive designation than such as was contained in the certificates furnished: See *Shields v. Jacob*, 88 Mich. 164. That case arose under Act No. 190, Public Acts of 1891, which provided for what is ordinarily called an "Australian Ballot," requiring the adoption of a vignette by each party, under which the party ticket was required to be printed.

A similar question arose in Colorado the next year, under a law of like character, which provided that the officer with whom the certificate was filed should pass upon objections seasonably filed. At a convention regularly called a disagreement arose, which resulted in a division and two tickets, each faction claiming to represent ⁴⁰² the party, and each filing the certificate provided for by the statute. It was claimed that the secretary of state had authority to determine which ticket was entitled to a place upon the ballot; but the court held otherwise. It was said that his power extended only to the correction of informalities. The court said: "As to what were the duties of the secretary of state under the circumstances of this case is still, however, to be decided. Here we have to deal with two conventions, each claiming the right to represent the same political party. The act itself will be searched in vain for any provision for such a contingency. It was not contemplated by the legislature, and therefore not provided for. It should not be a matter of surprise that the act as originally passed is not perfect in all particulars. The beneficent laws of the world have grown with

time, as the result of experiment and amendment. There being no provision in the act for a condition such as we have presented in this case, some have reached the conclusion, upon reading section 3 of the act [Sess. Laws 1891, p. 143], that the secretary of state could only certify one ticket as the ticket of the Democratic party, and that, therefore, of necessity, the duty devolved upon him of determining which of these conventions was entitled to speak for the Democratic party of the state of Colorado. Certainly, a court would be doing violence to the intelligence of any legislative body to assume that it was intended that such a question could be determined within forty-eight hours from the time objections were filed. The validity of the organization and acts of each convention is embraced in the controversy, the determination thereof involving party usages, party practices, and party principles, necessitating, perhaps, the taking of evidence of witnesses living at widely separated points. The section of the act under which it has been claimed the duty devolves upon the secretary of state to determine which convention is entitled to represent the Democratic party applies to county, city, and town clerks equally as well as to the state officer. It is as follows: 'Sec. 3. Any convention of delegates of a political party which presented candidates at the last preceding election, held for the purpose of making nominations to public offices, and also voters to the number hereinafter specified, may nominate candidates for public ⁴⁰³ offices to be filled by election within this state. A convention, within the meaning of this act, is an organized assemblage of voters or delegates representing a political party which, at the last election before the holding of such convention, polled at least ten per centum of the entire vote cast in the state, county, or other political division or district for which the nomination may be made. A committee appointed by any such convention may also make nominations to public office when authorized to do so by resolution duly passed by the convention at which such committee was appointed.'

"The argument upon this section is that, to entitle the convention of any party to nominate candidates for public offices, such party must have polled at least ten per centum of the entire vote cast in the state at the last preceding election, and that only one set of nominations can be filed by a single political party. That the argument has force will be admitted. It is quite probable the legislature had in contemplation the nomination of one ticket only by a political party, as the statute makes

no provision for the condition with which we are confronted. In this case we have two certificates of nomination, each in apparent conformity with the law. As we have shown, the secretary of state is not empowered to decide as between these certificates. Therefore, it is his duty to certify both tickets to the county clerks, in order that both may be printed upon the official ballots. By pursuing this course, the merits of the opposing candidates will be submitted to the people, the tribunal under our system of government that must ultimately pass upon such questions. The conclusion that the secretary of state should, under the circumstances, certify both sets of nominations to the county clerks, to be printed upon the official ballots, is in harmony with the rule of construction which requires the courts, in cases of doubt between two constructions, to follow that which will afford the citizen the greater liberty in casting his ballot. This is in accordance with the previous decisions of this court. In the case of *Kellogg v. Hickman*, 12 Colo. 256, Mr. Commissioner Stallcup, in an able opinion, which was adopted by this court after careful consideration, held that this should be the policy of the courts: See, also, *Allen v. Glynn*, 17 Colo. 338, 31 Am. St. Rep. 304. The severe penalties provided by the act for the filing of a false certificate of nomination will, we think, furnish a sufficient safeguard against fictitious certificates; if not, the power is in the legislature to provide adequate protection.

404 "Little weight should be attached to the argument that the voters may be deceived by having two Democratic tickets in the field. At one time, no doubt, voters were often misled by having names printed under certain designated headings that did not properly belong thereunder. But this deception was only accomplished by secrecy, and by the lateness of the hour at which such irregular tickets were distributed, usually only upon the day of election. But, under the present law, the danger of deception in the manner indicated is certainly reduced to the minimum. The secretary of state is required to certify these tickets to the county clerks, and the county clerks must, in turn, cause the same to be published several days before the election. Thus the fullest opportunity to expose fraud and prevent deception is provided for. In the present instance, different emblems were selected by the two conventions, and this furnishes an additional safeguard against deception": *People v. District Court*, 18 Colo. 26.

Phelps *v.* Piper, 48 Neb. 724, was a case where different conventions, called by different committees, but both claiming to represent one and the same party, held conventions at different times and places; and the question of the right of one ticket to a place on the ballot came before the court of last resort. It was held that both tickets were entitled to places upon the ballot. The court said: "The relator, by this proceeding, seeks to prevent the certification of the candidates of the Lincoln convention as Democratic candidates. If the action of the secretary of state can be controlled by the court in this manner, it must be because it is his duty in such case to determine, as between two bodies or factions, each claiming to represent a political party entitled to have its candidates' names placed upon the ballots, which of such bodies or factions, according to the rules and customs of such party, rightfully represents it; and, further, that, when the secretary fails to so adjudicate such question, the court shall determine it, and issue its mandate to the secretary of state accordingly. To our minds, neither proposition is tenable. Indeed, we think that the case of *State v. Allen*, 43 Neb. 651, is conclusive on the first question, at least. It was there held that it is not the province of the secretary of 405 state to determine which of two rival state conventions of the same party is entitled to recognition as the regular convention; and, further, that where two factions of a political party nominate candidates, and certify such nominations to the secretary of state in due form of law, the latter will not inquire into the regularity of the convention held by either faction, but will certify to the several county clerks the names of the candidates nominated by each, such practice being in harmony with the rule which requires courts, in case of doubt, to adopt that construction which affords the citizen the greater liberty in casting his ballot. In the case cited, candidates representing the same faction as that represented by the candidates which we will here, for brevity, designate the 'Mahoney Ticket,' applied for a mandamus to compel the secretary of state to certify their names as the candidates of the Democratic party, the secretary having refused to do so. The court denied the writ, holding as we have already stated, and, further, that, the record not disclosing that the relators had been nominated by any convention whatever, the secretary of state could not be required to certify the nominations, because it is his duty to determine, in the case of a certificate filed with him, whether such candidates were in fact nominated by a convention or assemblage of voters or delegates

claiming to represent the party; that is, he should satisfy himself of the genuineness of the certificate. But he has no authority, where a convention in good faith, claiming to represent the party, has in fact certified its nominations to him in due form, to refuse to recertify the same to the county clerks. We entertain no doubt of the correctness of the principles announced in that case; and it follows that the court, by a writ of mandamus, cannot compel the secretary of state to perform an act which he has no legal authority to perform. If it was the duty of the secretary to certify both sets of nominations, and if he had no power to determine, between the rival factions, which faction represented the Democratic party, then it seems perfectly clear that the court can neither require him to make such decision, nor can the court itself determine which faction rightfully represents the party, and upon such determination require the secretary to omit from his certificate one set of candidates, which *State v. Allen*, 43 Neb. 651, declares it is his duty to include in the certificate. The legislature has not provided any means for determining such controversies. Political parties are voluntary ⁴⁰⁶ associations for political purposes. They establish their own rules. They are governed by their own usages. Voters may form them, reorganize them, and dissolve them at their will. The voters ultimately must determine every such question. The voters constituting a party are, indeed, the only body who can finally determine between contending factions or contending organizations. The question is one essentially political, and not judicial, in its character. It would be alike dangerous to the freedom of elections, the liberty of voters, and to the dignity and respect which should be entertained for judicial tribunals, for the courts to undertake in any case to investigate either the government, usages, or doctrines of political parties, and to exclude from the official ballots the names of candidates placed in nomination by an organization which a portion, or perhaps a large majority, of the voters professing allegiance to the particular party believe to be the representatives of its political doctrines and its party government. We doubt even whether the legislature has power to confer upon the courts any such authority. It is certain, however, that the legislature has not undertaken to confer it."

The case of *State v. Johnson*, 18 Mont. 556, arose under a similar statute, and bears a striking resemblance to the present case. The convention was regularly called, but trouble arose when the secretary of the committee attempted to call the con-

vention to order. In the confusion that ensued, some of the delegates withdrew, and assembled at another place, claiming to act under the regular call. Each faction nominated a full ticket. The question of the respective rights as to places upon the ballot reached the supreme court of Montana, which disposed of the question as follows: "The question is simply one of the relative rights of rival factions within the ranks of the regularly elected delegates. Such a contention, under all the facts of the case, it is well to leave to the electors to determine. They cannot well be misled, because the names of the two factions should appear under different heads on the ballot, and each faction will appear but once. At all events, we shall follow the rule laid down in *Phelps v. Piper*, 48 Neb. 724, and decline to interfere."

407 It is observable that all the cases cited deny the authority of the officer or court to determine that the candidate of one or the other of two factions of a party is regularly nominated, and entitled to a place upon the ballot, where the statute has not expressly or by necessary implication conferred the power. Several of these question the expediency of committing such power to either, and some doubt the power of the legislature to pass such a law. There are several decisions in the state of New York which hold that the courts have authority to pass upon such questions, and determine, between factions of a party, the right to a place upon the ticket. These decisions are not adjudications by the court of last resort, however, and they arise under a statute expressly conferring the power. In the year 1897 a case was decided by the court of appeals (*In re Fairchild*, 151 N. Y. 359), where it was held that the action of the party authorities—i. e., conventions and committees—should be recognized as of controlling importance. We do not understand from what we are able to gather from the case that it was held that such decision was final or binding upon the court, but that it was proper to follow the determination of the party authorities; but, be that as it may, the important fact that the statute of New York expressly gives the courts jurisdiction in such cases does appear. So, it is not at variance with the other cases cited, except as some of them doubt the wisdom and others the constitutionality of laws permitting courts to decide one of two rival factions regular. The laws of New York provide that in such a case as the one then under consideration, viz., when two factions claim the same device or name, the secretary of state shall decide such conflicting claims, "giving preference of

device and name to the convention or primary, or committee thereof, recognized by the regularly constituted party authorities." The constitutionality of such laws does not seem to be questioned in the New York case. The case is interesting, if not important, for its bearing upon the claim made here that the state convention determined ⁴⁰⁸ between the rival factions in this case. But we are not disposed to follow it, in the absence of a statute requiring courts to settle these questions: See, also, *In re Redmond*, 5 Misc. Rep. 369; 25 N. Y. Supp. 381; *In re Pollard* (N. Y. Sup. Ct. 1894), 25 N. Y. Supp. 385.

As illustrative of the kind of difficulties which arise when the legislature imposes these duties upon the courts, one of the New York cases may be cited, viz., *In re Woodworth* (N. Y. Sup. Ct. 1892), 16 N. Y. Supp. 147. That was not the first time that the matter there litigated was before the courts, as will be seen later. It was a proceeding under a statute to compel a county clerk to print the names of certain parties claiming to be regularly nominated candidates of the Republican party of the county, and its determination involved an adjudication between rival factions (each claiming to be the regular organization) of the regularity of their respective nominations. At the outset the court expressed reluctance, saying: "This simple statement of the nature of the duty imposed is sufficient to indicate that it is one from which any judicial officer would gladly escape, were it possible to do so without disregarding the plain mandate of the law-making power of the state."

Objections were filed to the certificates, and passed upon by the county clerk, and then presented to the court, as the law provided. The court said that the certificates were regular, and that it was therefore necessary to go into extrinsic facts. These disclosed that the county convention split, and, as there were contesting delegations from four towns, which sent delegates enough to control the convention (in view of the fact that the undisputed delegates were evenly divided), it was only possible to determine which faction had a majority by ascertaining which of the contesting delegations were entitled to seats. This the court proceeded to do by investigating the proceedings at the caucuses. For convenience, we call the respective factions "Patterson" and "Mongin." Each faction had a town committee and a town caucus, and a ⁴⁰⁹ judicial inquiry was had after the caucuses were called, and the same court decided in favor of the Patterson caucus; but the opinion says: "That fact did not deter the Mongin party from holding the caucus which elected

Mongin and four others to represent the town of Waterloo in the county convention." Without discussing the details of the caucuses held in the other three towns, we will come at once to the county convention, and here we find a striking resemblance to this case. The opinion states that: "Previous to the hour appointed for the convening of the convention, a meeting of the county committee was held. This committee, with a single exception, was composed of persons in sympathy with the Mongin wing of the party; and at the meeting in question it was determined to place upon the roll of delegates the names of the Mongin delegates from the towns of Waterloo, Fayette, and Tyre, while the delegation from the town of Varick was made to consist of five Patterson delegates, together with five other persons, who made no pretense to an election by any caucus whatever, and each of said delegations was given the privilege of casting one-half a vote. It was further determined that the chairman of the committee should call the convention to order, and declare J. B. H. Mongin, of Waterloo, a pretended delegate, whose title was absolutely without foundation, its chairman. It was also determined that no one should be admitted to the hall unless provided with tickets furnished by the committee, and, to carry this provision into effect, policemen were stationed at the door. As thus constituted, the convention, when it assembled, consisted of fifteen Mongin and fifteen Patterson delegates whose election was not contested; ten Mongin delegates from the towns of Waterloo and Fayette, who, as it has been made already to appear, had no right upon the floor of the convention; five Mongin delegates with half a vote from the town of Varick, who could not, under any circumstances, make any just claim to an election; and five Mongin delegates from the town of Tyre, concerning whose election there was, to say the least, grave doubt.

"The programme thus outlined by the action of the county committee was carried out to the letter, and, when an attempt was made on behalf of the Patterson faction to ⁴¹⁰ substitute the name of a delegate whose title to a seat was uncontested for chairman of the convention, the motion was not entertained by the chairman of the county committee. A committee upon contested seats was then appointed, which committee, within half an hour after its appointment, and without affording an opportunity to anyone to be heard, reported in favor of seating the delegates placed upon the roll by the county committee. At this point in the proceedings the delegates from the towns of Ovid, Romulus, Varick, and Junius withdrew from the con-

vention, and organized a separate convention in another place, which was participated in by regularly elected delegates from the towns of Waterloo and Fayette, and also by the Patterson delegates from the town of Tyre; and proceedings were had which resulted in the nomination of persons whose names it is demanded in these proceedings shall be printed upon the official ballot. This body was composed of at least thirty delegates, who were duly and fairly elected, while the Johnson Hall convention contained, at most, only twenty whose election, by any stretch of the imagination, can be claimed to be valid. It would seem, therefore, that within the letter as well as the spirit of the act in question, the former body constituted 'an assemblage of voters or delegates representing' the Republican party of Seneca county.

"But it is insisted that a political convention is a law unto itself, and that whatever methods it adopts for its own government are conclusive, and cannot be made the subject of judicial inquiry. To a certain extent this contention may be, and doubtless is, true. It certainly was presented with the most consummate force and ability by one whose experience in and knowledge of such matters lends great weight to his opinions. But, where the duty is cast upon courts and judges of determining the regularity and fairness of political methods, those methods must be subjected to the same tests as would those of any other body of men whose good faith is questioned; and no court or judge would be justified in sustaining them when found to be inconsistent with that degree of sound morals which must characterize an ordinary affair of business, even though they be recognized and approved by senatorial and state conventions of the same political organizations. The trend of public opinion, as well as of legislation, at the present time, appears to be in favor of a radical reform in our political methods; and it is the plain duty of all good ⁴¹¹ citizens, and especially those clothed with judicial authority, to encourage such a sentiment with all the force they can command."

In short, the court assumed to determine who were the lawful delegates, and held that the faction having the largest number of such delegates was entitled to a place upon the ticket, irrespective of the regularity or irregularity of the organization or action of the convention, upon the assumption, we suppose, that it was a deliberative body only in name, whose delegates would blindly vote for the candidate favored, without deliberate consideration of merits.

But the case did not end here. It came again before the same court, and we quote from the opinion: "The controversy which has resulted in this application is one which arose in the year 1891, between conflicting factions of the Republican party in Seneca county, each of which claimed to be regular in its organization. At the time mentioned, a proceeding similar to this was instituted for the purpose of obtaining a judicial determination of the matter; and, after a careful examination of the papers submitted, I found myself constrained to decide in favor of that element in the party known as the 'Patterson Faction,' and my reasons therefor were stated in an opinion which was designed to cover all the facts of the case: In re Woodworth, 16 N. Y. Supp. 147. This decision was subsequently affirmed by the general term (64 Hun, 522), and the following year was approved by my learned associate, Mr. Justice Bradley. Notwithstanding these several adjudications, every state convention, and every judicial, congressional, and senatorial convention of the district in which Seneca county is located, which has been held since they were rendered, has seen fit to ignore the same, and to recognize the opposing or Mongin faction as the only lawful representative of the party. The Patterson delegates have been refused admission to all of these conventions to which delegates were sent, while those of the Mongin faction were received into full fellowship, and the county committee of that faction has been made the custodian of such funds and documents as were distributed by the state committee. This being the situation, I am again asked to determine the question of regularity ⁴¹² upon facts which, other than as above stated, are precisely the same as those which existed at the time the first adjudication was had. The proposition, therefore, which presents itself, is simply this: Shall the precedent which has been established by courts and judges, or that which has been established by political conventions, be followed? When this controversy first required a judicial determination, it became necessary to decide it upon such facts as were established by affidavits, unaided by the action of any convention of the party; and, as those facts were thus made to appear, I had no difficulty in reaching the conclusion before mentioned. I am still satisfied that such conclusion was justified, and should now adopt it without hesitation, were it not for the fact that a different one has been so uniformly reached by the party conventions. In determining a question similar to this which arose in Monroe county (In re Redmond,

5 Misc. Rep. 369, 25 N. Y. Supp. 381), where the question of regularity had been passed upon by the state convention of the Democratic party, I have just held that the action of that body must be regarded as conclusive; and I see no reason why the same rule should not obtain in this case. The only difference is that here the state organization did not pass upon the question until after it had been determined judicially; but, nevertheless, both factions submitted their claims to that body and, for the reason stated in the opinion in *In re Redmond*, 5 Misc. Rep. 369, 25 N. Y. Supp. 381, I think the defeated party must now acquiesce in its decision. I am aware that this view is at variance with the one expressed by me upon the former hearing, and it likewise appears to be in conflict with that entertained by Mr. Justice Bradley in his opinion in this same matter; but, so far as any contrary view appears in my own opinion, it will be found to be merely the expression of an opinion which was not called for by the facts of the case, and it is one which, upon more deliberate reflection, I am disposed to modify. The conflict between the views here expressed and those of Mr. Justice Bradley is more apparent than real, inasmuch as it now appears that, since his decision was made, the regularity of the Mongin faction has been passed upon by several additional conventions, and that the opposing faction has so far acquiesced in their decisions as to omit in more than one instance to make any further demand for recognition.

"I still think, as already stated, that the title to regularity of the Patterson faction was pretty clearly established ⁴¹³ upon the original hearing, and that it would, in view of the provision of the statute which authorizes this proceeding, have been no more than courteous for the party conventions to have adopted the decision of the general term, which was deliberately made, after a careful and impartial hearing; but there is no way in which they can be compelled to do so, and consequently it seems to me that the only rule for courts and judges to adopt in this and all similar contests is that they will interfere only in cases where there has been no adjudication of the question of regularity by some division of the party which is conceded to be superior in point of authority to the one in which the contention arose, provided, of course, that the question of good faith in the making of such adjudication is not involved. The adoption of a different rule would inevitably tend to bring party organizations and the courts into unseemly conflicts over questions which are peculiarly within the cognizance of the

former tribunals—a result which most certainly ought, if possible, to be avoided”: *In re Pollard*, 25 N. Y. Supp. 385.

Thus, it will be seen that Mongin and politics triumphed over the judicially determined rights of Patterson. A more unseemly and humiliating chapter is not to be found in the history of jurisprudence in this country, and it is all due to the misguided attempt to impose upon the court the duty of presiding over political conventions and caucuses through the medium of actions or proceedings at law, unfitted for the purpose. In *In re Fairchild*, 151 N. Y. 359, the matter was not disposed of until after the election and, therefore, when heard and decided, involved only a question of costs. In the case before us, had issue been joined, and the case sent down for trial of the facts, it is not improbable that it would be still dragging along when the term of office for which the parties are candidates shall have expired.

We have seen that this court held in *Shields v. Jacob*, 88 Mich. 164, that the tickets of both factions were entitled to places upon the ballot. The same is true in this case, unless we can find a change in the law forbidding it, and requiring us to determine which ticket is entitled to the place.

⁴¹⁴ Another case where two factions resulted from a regularly called convention is that of *Beck v. Wayne Co. Election Commrs.*, 103 Mich. 192. The application prayed that the respondents be required to rescind their action in placing the name of Joseph R. McLaughlin upon the ballot as candidate for senator, and to place thereon the name of Robert Y. Ogg. The application was denied. The court discussed several subjects bearing upon the question which faction had a majority of the delegates, and held that the convention was regularly called, and that, after the retirement of the supporters of Mr. Ogg, a majority of the delegates elect remained, constituting a valid convention, and nominated McLaughlin. The court was able to say this from the undisputed facts upon the record. It might also have denied the writ upon the authority of *Shields v. Jacob*, 88 Mich. 164, both cases having arisen under the same law. This case does not discuss *Shields v. Jacob*, 88 Mich. 164, and cannot be said to overrule that case, or even cast doubt upon its correctness, unless it is to be implied from the disposition of the case upon other grounds.

The next case that received the attention of this court was *Baker v. Wayne Co. Election Commrs.*, 110 Mich. 635. That

was not a case where rival factions asserted an exclusive right to a place upon the ballot, but was a controversy over the question of the order in which the tickets should be placed thereon. The crucial question in the case was whether the party represented by the relator, known as the Democratic People's Union Silver party, was entitled to be printed in the second column as the representative of the Democratic party of the previous election. It was conceded upon all hands that, if it was such representative, it was entitled to second place. The facts upon which the case turned were undisputed, and the question was one of law. The application was denied. Some language in the opinion is thought to have a bearing upon the question before us, and is cited in support of the claim that we have recognized the authority, if not duty, of the commissioners and courts to determine the questions of ⁴¹⁵ fact upon which the order of tickets upon the ballot depends, and that they must therefore decide all questions of regularity. It is as follows: "The reluctance of the courts to enter upon an inquiry, or to permit an inquiry by the election commissioners, into the question of fact as to which of two contending factions truly represents a political party, has been manifested in various cases: *State v. Allen*, 43 Neb. 651; *Phelps v. Piper*, 48 Neb. 724; *Shields v. Jacob*, 88 Mich. 164. In *Shields v. Jacob*, 88 Mich. 164, it was held that the court would not undertake to determine which of two rival conventions, resulting from a split in a regularly called convention, should be treated as the regular convention of the party; and a mandamus was issued requiring the election commissioners to give to both tickets a place upon the ballot. At the time that decision was rendered, however, the provision requiring that the ticket of the party having the greatest number of votes within the county at the last preceding election should be placed first upon the ballot, and that the position of other tickets should be governed relatively by the same rule, was not a part of the statute, and it was not necessary to determine which of these tickets should be placed first on the ballot. Under the law as it now exists, such an investigation seems necessary, and it would seem that the commissioners did determine the question, and place the Shelby ticket second on the ballot."

Two questions were involved in the determination in that case: 1. The identity of the parties; and 2. Their previous votes as compared with those of others. About neither of these is there much opportunity for dispute over the facts, and little

danger in leaving the subject to the election boards. In that case it was stated that the facts were not in controversy.

We are not dealing with a case in which a candidate has been nominated in a regularly called convention, by a majority of the delegates regularly elected, and admittedly entitled to seats in the convention, or shown by the undisputable evidence to be entitled to seats therein, as was the case in *Beck v. Wayne Co. Election Commrs.*, 103 Mich. 192. In such a case the question presented may be a mere ⁴¹⁶ question of law, and the candidate regularly nominated entitled to a place on the party ticket, to the exclusion of one who may have been nominated by the refractory minority.

It is urged that the statute assigning certain places upon the ballot gives rights to candidates which may be enforced by the court, and that, if the courts may determine the status of parties, they may also determine between factions of one party; and the effect of this contention, if sustained, would be to open up the entire field, and make it incumbent upon courts to investigate the regularity, not only of conventions, but caucuses and primaries as well. We think there is a marked distinction between determining the places to be given to two different tickets upon the ballot, and denying to a faction of a party any place whatever. If this claim does not ascribe undue weight to the alleged rights of the candidate, and too little to public interests, it is at least true that judicial methods are too slow, and are inadequate to effectively and justly settle the questions which arise from political contests. Among the dangers that courts should guard against is the unwarranted assumption of power under the false impression that they, and they only, can right all of the wrongs which arise from the conduct of public affairs. They have only such powers and authority as the constitution and the laws confer upon them. We have seen that several courts have held that not until the intention of the legislature is clearly manifested will they undertake to control political action. We have held in *Baker v. Wayne Co. Election Commrs.*, 110 Mich. 635, that it was the province of the court to decide the status of political parties upon admitted facts; but we think it does not follow that it was intended that we should go further, and settle all political controversies. Under the law as expounded in the case of *Shields v. Jacob*, 88 Mich. 164, the commissioners had no authority to decide between these two factions. It was their duty to print both upon the ballot.

It may be said that under the law of 1895 (Act No. 17, ⁴¹⁷ Pub. Acts 1895, sec. 10), providing that "it shall be unlawful for said board of election commissioners to cause to be printed in more than one column on the ballot the name of any candidate who shall have received the nomination by two or more parties or political organizations for the same office," one or the other of the nominees will be at the disadvantage of having his name appear in a column by itself, as in the Todd case: *Todd v. Kalamazoo Co. Election Commrs.*, 104 Mich. 485. We think, however, that the public good requires the private inconvenience; and we cannot hold, in the absence of a statute requiring it, that the nominee may stickle for a comparatively unimportant right, to the general public inconvenience to result from his pursuit of an unauthorized remedy of doubtful efficacy and expediency.

It may be asked which of these nominees should be subjected to this disadvantage. Manifestly, we have no means of determining this question, nor can we lay down the rule for such a case as this further than to say that their names should appear in adjoining columns.

It is therefore ordered that the several respondents give to the names of the nominees adjoining columns, said respondents themselves determining which shall be placed upon the general ticket of the Republican party, the other to be in a separate column under the party name and vignette; the full ticket to be placed first upon the ballot. No costs will be allowed.

The other justices concurred.

CONTESTED ELECTIONS.—Statutes relating to contested elections should be liberally construed by the courts, so that the rights of the people may be preserved, and that no protection may be afforded to fraud: *Whitney v. Blackburn*, 17 Or. 564, 11 Am. St. Rep. 857. For an exposition of the law relating to contested elections, see *Attorney General v. Drohan*, 169 Mass. 534, 61 Am. St. Rep. 301, and note; *Allen v. Glynn*, 17 Colo. 338, 31 Am. St. Rep. 304; *Fenton v. Scott*, 17 Or. 189, 11 Am. St. Rep. 801, and cases in note.

BECK v. RAILWAY TEAMSTERS' PROTECTIVE UNION.

[118 MICHIGAN, 497.]

LABOR UNIONS—INTERFERENCE WITH EMPLOYERS.

The law protects employers against the unlawful interference by trade unions, with the right of the former to employ whom they please, at such prices as they and the persons employed can agree upon, and to discharge them at the expiration of their terms of service or for violations of their contracts.

LABOR UNIONS—RIGHTS OF.—Laborers have the right to combine and to fix a price upon their labor and refuse to work unless that price is obtained. They may use persuasion to induce men to join their organization, or to refuse to work except for an established wage, and they may present their cause to the public in newspapers or circulars, in a peaceable way, and with no attempt at coercion, but the law does not permit them to use force, violence, or threats thereof, or intimidation or coercion.

LABOR UNIONS AND EMPLOYERS.—Employés have the right to combine in unions to fix their wage rate, and employers have a right to combine and fix a rate they are willing to pay; but both must act in a peaceable way, with no attempt at coercion or intimidation.

BOYCOTTS.—INJUNCTIONS MAY BE GRANTED to restrain labor unions or combinations of persons from attempting to injure or ruin the complainant's business, by intimidating and coercing his employés and customers.

BOYCOTTS—CIRCULARS—INJUNCTION.—The distribution of boycott circulars containing false statements and with an avowed intention of thus ruining the complainant's business, though carried on without violence, is an act of coercion which may be enjoined.

BOYCOTTS.—PICKETING THE PREMISES OF THE COMPLAINANT in order to intercept his employés or to prevent persons from going there to trade is an unlawful act of intimidation and coercion, which may be enjoined.

BOYCOTT IS A COMBINATION OF MANY to cause a loss to one person by coercing others against their will to withhold from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them.

BOYCOTTS WITHOUT THREATS OF VIOLENCE.—Unlawful boycotts are not alone those accompanied by violence or threats of violence, but when the means employed are threatening in their nature, and intended and naturally tend to overcome, by fear of loss of property, the will of others, and compel them to do things which they would not otherwise do, the boycott is equally unlawful.

BOYCOTTS—CIRCULARS—INJUNCTION—LIBEL.—An injunction against the circulation of false boycotting circulars intended to intimidate employés and customers of the complainant may be granted, although their publication as a libel would not be enjoined.

Bill by Jacob Beck & Sons, a partnership, against the Railway Teamsters' Protective Union, the Detroit Council of Trades and Labor Unions, George Ennis, and others to enjoin the boycotting of complainants' business. Complainants appeal from

a decree merely enjoining the use of violence or threats of violence.

Bowen, Douglas & Whiting, for the appellants.

P. E. Park & T. E. Tarsney, for the appellees.

513 GRANT, C. J. The allegations of the bill are fully sustained by the evidence. When complainants' teamsters presented the contract to them in July, they informed complainants that it was not so much the wages, but it was "the scale they wanted them to sign." The teamsters did not have the contract with them, and again called in the evening, with the defendant **514** Innis. The contract being a long one, complainants took time to consider it; and when Innis and the teamsters called, a few days afterward, complainants declined to sign it, and informed Innis and the teamsters that they had made arrangements with the Shedden Truck Company and others to do their trucking during the summer. The Shedden Truck Company employed only union men. Complainants also employed one Richardson, who owned a team, and was not a member of the union, to do some teaming. The union teamsters immediately began obstructing Mr. Richardson in his work, by getting in his way, and howling at him; and, when Mr. George Beck came up on his bicycle, some one in the crowd cried out: "Here is a rope. Hang Beck with that. That is the fellow you want." Some sticks and bricks were also thrown. A policeman was called, and then the union teamsters gave Mr. Richardson the right of way. Meanwhile crowds collected in a threatening manner around the mill to watch those going to purchase and to endeavor to stop them. Two policemen were called in to preserve order. This state of affairs continued for about a week, during which time customers were intimidated and frightened away, and the Shedden Truck Company forced to refuse to do trucking for complainants. The boycotting circular was issued, and it was distributed to complainants' customers and others by the representatives of the union, in the streets and elsewhere.

On August 7th the executive committee from the Council of Trades and Labor Unions, accompanied by Mr. Innis, visited complainants, and endeavored to persuade them to sign the agreement. Union teamsters to the number of ten or fifteen were then outside in the street, making considerable noise. Complainants refused to sign the scale, and informed their vis-

itors that they had employed the Shedden Truck Company to do their trucking for the summer, and that when they brought their teams back in the fall they would notify the union. This pacified the union, though the result was to throw the five teamsters ⁵¹⁵ then belonging to the union and employed by complainants out of employment. In October complainants brought back their teams, and notified Innis of the fact, and that they should employ their own teamsters, and would not sign the contract. Then the Teamsters' Union, defendant Innis, and others, evidently with the approval of the Trades Council, began the systematic course of conduct complained of. Meanwhile complainants' teamsters, without their advice or knowledge, had withdrawn from the union. Members of the union followed complainants' teamsters along the streets, howling at them, and using aggressive, abusive, and filthy language. They followed them to their destination, and there threatened to boycott the customers of Beck & Sons. They intercepted upon the streets those who were going to the mill with their teams. Defendant Innis boasted that he had turned fifteen customers away in one day. Violence was threatened by Delegate Innis and others. Some of them even went into the barn of the complainants, and endeavored, by abusive and threatening language, to drive the teamsters away from their work. Their conduct and threats were in some instances accompanied by language too filthy to print. These facts are unchallenged, the defendants introducing no testimony to deny them or to impeach the character of the witnesses. In this condition of affairs, complainants filed this bill to enjoin these illegal acts, and to save their business from destruction, and themselves from financial ruin.

The defendants have not appealed from the decree against them. No attempt is made by their counsel to defend or justify their action, or to deny the many acts of intimidation, threats, and almost violence; and the learned circuit judge in his opinion said: "I am satisfied these things have been done, and that defendants have combined together for this purpose. I do not intend to justify the publication." Their counsel frankly concede that "it was unlawful for defendants to enter upon the premises of the complainants, or to gather in groups in the street in ⁵¹⁶ front of complainants' premises, or to use any force or violence for the accomplishment of their purpose." In other words, they concede that defendants were engaged in an "unlawful conspiracy," as defined by Shaw, C. J., in Common-

wealth v. Hunt, 4 Met. 111, 121, 38 Am. Dec. 346, a definition approved by the supreme court of the United States in Callan v. Wilson, 127 U. S. 540, 555, viz.: "The general rule of the common law is that it is a criminal and indictable offense for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual."

The decree sanctioned the distribution of the boycott circulars to customers and the public generally, except in front of the mill premises, and any form of boycott, either to complainants or to their customers, without the actual use of violence, and sanctioned threats to injure, affect, and ruin complainants' business, when unaccompanied by violence or threat of violence. From this part of the decree complainants have appealed.

It is conceded that courts of equity have jurisdiction to restrain conspiracies of this character when irreparable injury is sure to follow. Suits at law would be inadequate, and a multiplicity of suits at law would arise. Complainants were engaged in a lawful business, and carrying it on in a lawful manner. They had done nothing to the defendants, or any of them, either illegal, immoral, or unjust. They were paying wages to their teamsters in fact greater than the union teamsters received, because they made no deductions for certain lost time which the union employers made. The law protects them in the right to employ whom they please, at prices they and their employes can agree upon, and to discharge them at the expiration of their term of service or for violation of their contracts. This right must be maintained, or personal liberty is a sham. So, also, the laborers have ⁵¹⁷ the right to fix a price upon their labor, and to refuse to work unless that price is obtained. Singly, or in combination, they have this right. They may organize in order to improve their condition and secure better wages. They may use persuasion to induce men to join their organization, or to refuse to work except for an established wage. They may present their cause to the public in newspapers or circulars, in a peaceable way, and with no attempt at coercion. If the effect in such case is ruin to the employer, it is *damnum absque injuria*, for they have only exercised their legal rights. The law does not permit either party to use force, violence, threats of force or violence, intimidation, or coercion. The right to trade and the personal liberty of the employer alone are

not involved in this case; the right of the laborer to sell his labor when, to whom, and for what price he chooses is involved.

The five teamsters of the complainants were satisfied with their wages and their treatment. By the action of the defendants, they were thrown out of employment during the summer, except as complainants employed them, when they could, at other work about their mill. The union would not permit Mr. Pfaff to use a horse and wagon which complainants tendered him free of expense, in order that he might provide for himself and family. A boycott of labor as well as of capital is, therefore, involved in this controversy. The acts and conduct of these defendants are not those of freedom, but of tyranny.

Let us look at the correlative of what these defendants did. If employ  s have the right to combine to fix their wage rate—and this is conceded—employers have the like right to combine to fix a rate they are willing to pay. The law is the same for both, and is alike open to both. If the employers of Detroit had combined in secret organization, established a rate, and agreed to boycott, in the manner these defendants boycotted complainants, any employer and his laborers who would pay more than the price the combination had agreed to, and had carried the ⁵¹⁸ conspiracy out as was done here, would these defendants consider that just and lawful conduct? Neither courts of equity nor of law would turn such employer and employ  s away from its temple of justice without a remedy.

It requires no argument to show that in this case, both in reason and authority, actions at law would be utterly inadequate. The course pursued by these defendants, if unchecked, would soon ruin the complainants' business, and bring upon them financial ruin. The defendants and their associates well knew this, and undoubtedly hoped to force complainants to abdicate their legal rights, and to permit defendants to dictate whom complainants should employ, the price they should pay, and the reasons for discharging their employ  s. While some writers have doubted the remedy by injunction, it is now settled beyond dispute: *Thomas v. Cincinnati etc. Ry. Co.*, 62 Fed. Rep. 803; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. Cas. 551; *Vege-
lahn v. Guntner*, 167 Mass. 92, 57 Am. St. Rep. 443; *Davis v. Zimmerman*, 91 Hun, 489; *Gilbert v. Mickle*, 4 Sand. Ch. 357; *United States v. Elliott*, 64 Fed. Rep. 27; *Hopkins v. Oxley Stave Co.*, 28 C. C. A. 99, 83 Fed. Rep. 912; *Toledo etc. Ry. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730; *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689; *Hamilton-Brown Shoe Co. v.*

Saxe, 131 Mo. 212, 52 Am. St. Rep. 622; *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. Rep. 310. Many more authorities might be cited.

There is a long list of civil and criminal authorities which might also be cited holding such combinations unlawful. Among them are the following: *State v. Donaldson*, 32 N. J. L., 151, 90 Am. Dec. 649; *State v. Glidden*, 55 Conn. 46, 3 Am. St. Rep. 23; *Regina v. Bunn*, 12 Cox C. C. 316; *Rex v. Ferguson*, 2 Stark. 489; *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501; *People v. Kostka*, 4 N. Y. Cr. Rep. 429; *Walker v. Cronin*, 107 Mass. 555; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *People v. Melvin*, 2 Wheel. C. C. 262; *Crump v. Commonwealth*, 84 Va. 927, 10 Am. St. Rep. 895; ⁵¹⁹ *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710; *Callan v. Wilson*, 127 U. S. 540. For instances of lawful combinations, see *Commonwealth v. Hunt*, 4 Met. 111, 38 Am. Dec. 346; *Master Stevedores' Assn. v. Walsh*, 2 Daly, 1; *Wood v. Bowron*, 10 Cox C. C. 344; *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 598; *Allen v. Flood*, 23 App. Cas. 1; *Brewster v. Miller*, 101 Ky. 368; *Macauley v. Tierney*, 19 R. I. 255, 61 Am. St. Rep. 770; *Clemmitt v. Watson*, 14 Ind. App. 38.

The law abhors subterfuges. It lays aside the covering, and looks to the actual facts beneath. In the language of Chief Justice Shaw: "The law is not to be hoodwinked by colorable pretenses; it looks at truth and reality, through whatever disguise it may assume": *Commonwealth v. Hunt*, 4 Met. 111, 129, 38 Am. Dec. 346.

Threats in language are not the only threats recognized by the law. Covert and unspoken threats may be just as effective as spoken threats. So, where banners were displayed in front of one's premises bearing the following inscription: "Lasters are requested to keep away from P. P. Sherry's. Per order L. P. U.," it was held unlawful, and the act restrained by injunction: *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689. The court said: "The banner was a standing menace to all who were, or wished to be, in the employment of the plaintiffs, to deter them from entering the plaintiffs' premises." The court held that the display of the banners was part of the scheme unlawfully entered into.

So, when these defendants went, in numbers of from five to twenty-five, along the streets, and into the business houses of complainants' customers, distributing these circulars, which contained false statements, as hereinafter shown, and which

commenced and closed with the words, "Boycott Jacob Beck & Sons," they intended, in emphatic manner, to convey to the customers of complainants that they would be treated in like manner unless they ceased to trade ⁵²⁰ with complainants. The distance that this was done from the mill of the complainants does not detract from its character or harmfulness. It was just as effective and as wrong when done one thousand feet from the mill as when done ten feet from it. The act itself, not the distance, determines its character. The circular was false in stating that complainants had violated their agreement or had discharged their union men. They had done neither. It was also false in conveying the impression that complainants were not paying living wages or giving their employes fair treatment. The use of this false circular was one of the potent means to carry out the conspiracy. The defendants by their conduct gave every laborer and customer of complainants their definition of what they understood the term "boycott" to mean. It would be idle to argue that these circulars were not intended as a menace, intimidation, and coercion. They were so used, and were "a standing menace" to everyone who wished to work for, or trade with, complainants. They constituted a part of the unlawful scheme, and their circulation should have been enjoined.

To picket complainants' premises in order to intercept their teamsters or persons going there to trade is unlawful. It itself is an act of intimidation, and an unwarrantable interference with the right of free trade. The highways and public streets must be free to all for the purposes of trade, commerce, and labor. The law protects the buyer, the seller, the merchant, the manufacturer, and the laborer in the right to walk the streets unmolested. It is no respecter of persons, and it makes no difference, in effect, whether the picketing is done ten or one thousand feet away.

It will not do to say that these pickets are thrown out for the purpose of peaceable argument and persuasion. They are intended to intimidate and coerce. As applied to cases of this character, the lexicographers thus define the word "picket": "A body of men belonging to a trades union sent to watch and annoy men working in a ⁵²¹ shop not belonging to the union, or against which a strike is in progress": Century Dictionary; Webster's Dictionary. The word originally had no such meaning. This definition is the result of what has been done under it, and the common application that has been made of it. This

is the definition the defendants put upon it in the present case. Possibly the decree is specific enough to include picketing, but we deem it our duty to place it beyond controversy.

The decree permits "boycotting by peaceful means," and the ruin of complainants' business by threats or any means short of violence. If, as some authorities hold, the term "boycott" has no authoritative meaning, then the decree is indefinite, and the defendants have no guide except that they must refrain from actual violence or threats of violence. The authorities do not sustain this proposition. If these defendants had threatened complainants' teamsters that, unless they ceased to work for them and joined the union, they had the power, and would use it, to induce all merchants not to sell them any goods by which they might support themselves and families, and had carried out this threat by issuing boycotting circulars, and notifying merchants personally by their committee, that they must cease to sell goods to these men, there would have been no act or threat of violence. But would the boycott or conspiracy have been lawful? May these powerful organizations thus trample with impunity upon the right of every citizen to buy and sell his goods or labor as he chooses? This is not a question of competition, but rather an attempt to stifle competition. It is a question of the right to exist. If there be no redress from such wrongs, then the government is impotent indeed. But such a combination is a criminal conspiracy at the common law, and in some states, in order to remove all doubt, is made so by statute.

In *State v. Glidden*, 55 Conn. 46, 3 Am. St. Rep. 23, no act or threat of violence was charged in the indictment or proved upon the trial. The charge was that: "If the corporation did not yield to their demands, the defendants and their associates would in like manner ⁵²² represent to and threaten all persons dealing with the corporation; and that they could and would so control, boycott, and injure the business customers of such persons, as through fear, and by the to-be threatened and concerted withdrawal of the patronage of the defendants, and by stopping and preventing the patronage of others through threats and intimidations, and by other unlawful means, to compel such customers, though against their will, to cease doing business with the subscribers and others, patrons of the corporation; and that the defendants would not give up or abandon these proceedings to injure the business of the corporation until they had either destroyed said business, and prevented it from being carried on, or until the corporation should comply with their demands."

That case and this are substantially alike. In order to induce complainants to yield, the committee of the Trades Council informed them that they had substantially ruined one man. The decision of the court was unanimous, and in it is the following language: "If we look at this transaction as it appears on the face of this information, we shall be satisfied that the defendants' purpose was to deprive the Carrington Publishing Company of its liberty to carry on its business in its own way, although in doing so it interfered with no right of the defendants. The motive was a selfish one—to gain an advantage unjustly, and at the expense of others—and therefore the act was legally corrupt. As a means of accomplishing the purpose, the parties intended to harm the Carrington Publishing Company, and therefore it was malicious. It seems strange that in this day, and in this free country—a country in which law interferes so little with the liberty of the individual—it should be necessary to announce from the bench that every man may carry on his business as he pleases, and may do what he will with his own, so long as he does nothing unlawful, and acts with due regard to the rights of others; and that the occasion for such an announcement should be, not an attempt by government to interfere with the rights of the citizen, nor by the rich and powerful to oppress the poor, but an attempt by a large body of workingmen to control, by means little, if any, better than force, the action of employers. The defendants and their associates said to ⁵²³ the Carrington Publishing Company: 'You shall discharge the men you have in your employ, and you shall hereafter employ only such men as we shall name. It is true we have no interest in your business, we have no capital invested therein, we are in nowise responsible for its losses or failures, we are not directly benefited by its success, and we do not participate in its profits; yet we have a right to control its management, and compel you to submit to our dictation.' The bare assertion of such a right is startling. The two alleged rights cannot possibly co-exist. One or the other must yield. If the defendants have the right which they claim, then all business enterprises are alike subject to their dictation. No one is safe in engaging in business, for no one knows whether his business affairs are to be directed by intelligence or ignorance, whether law and justice will protect the business, or brute force, regardless of law, will control it; for it must be remembered that the exercise of the power, if conceded, will by no means be confined to the matter of employing help. Upon the same principle, and

for the same reasons, the right to determine what business others shall engage in, when and where it shall be carried on, etc., will be demanded, and must be conceded. The principle, if it once obtains a foothold, is aggressive, and is not easily checked. It thrives on what it feeds on, and is insatiate in its demands. More requires more. If a large body of irresponsible men demand and receive power outside of law, over and above law, it is not to be expected that they will be satisfied with the moderate and reasonable use of it. All history proves that abuses and excesses are inevitable. The exercise of irresponsible power by men, like the taste of human blood by tigers, creates an unappeasable appetite for more. Business men have a general understanding of their rights under the law, and have some degree of confidence that the government, through its courts, will be able to protect those rights. This confidence is the cornerstone of all business. But if their rights are such only as a secret and irresponsible organization is willing to concede to them, and will receive only such protection as such an organization is willing to give, where is that confidence which is essential to the prosperity of the country?"

The true principle is thus stated: "It is in the line of competition, and every way just, ⁵²⁴ for a laborer to seek an enhancement of his wages, and for an employer to desire to depress them. The end is lawful, and especially in the laborer it is commendable. But when the means devised for this just end is the destruction of competition by men, combining to shut others out from the benefits which they claim for themselves, or to violate their agreements, or to commit assault and battery and other breaches of the peace, or to wield the power of numbers for the impoverishment of those who refuse to join or cooperate with them, or to move suddenly and together in a manner to injure the public, or even one person, the conspiracy is a public harm, calling loudly for punishment": 2 Bishop's New Criminal Law, sec. 230, par. 2.

In *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. Cas. 561, the publication of placards and advertisements, which was part of a scheme to prevent persons from working, and which did intimidate and prevent them, was, upon demurrer to the bill, enjoined, though no violence was threatened. The vice-chancellor said: "Upon the general question whether this court can interfere to prevent these unlawful proceedings by workmen issuing placards amounting to intimidation, and whether acts of intimidation generally would go to the destruction of property, that

will probably have ultimately to be decided at the hearing of this cause. In the meantime I would only make this observation: That by the act of parliament it is recited that all such proceedings are injurious to trade and commerce, and dangerous to the security and personal freedom of individual workmen, as well as the security of the property and persons of the public at large; and if it should turn out that this court has jurisdiction to prevent these misguided and misled workmen from committing these acts of intimidation, which go to the destruction of that property which is the source of their own support and comfort in life, I can only say that it will be one of the most beneficial jurisdictions that this court ever exercised."

In *Casey v. Typographical Union*, 45 Fed. Rep. 135, the attempt was to compel complainant to unionize his establishment. No violence or threats of violence were used. Otherwise the case is the parallel of this. The court say of it, at page 143: 525 "It was an organized conspiracy to force the complainant to yield his right to select his own workmen, and submit himself to the control of the union, and allow it to regulate prices for him, and to determine whom he should employ and whom discharge. In other words, it was and is an organized effort to force printers to come into the union, or be driven from their calling for want of employment, and to make the destruction of the complainant's business the penalty for his refusing to surrender to the union. Whatever moral obligation may have been incurred by complainant by reason of his promises to unionize his office, they were wholly without consideration, and they amount to nothing whatever, in law or in equity. No case has been cited where, upon a proper showing of facts, an unsuccessful appeal has been made to a court of chancery to restrain a boycott. The authorities are all the other way. At common law an agreement to control the will of employers by improper molestation was an illegal conspiracy." Similar language will be found in other of the cases above cited and in others not cited.

The term "boycott" has been defined by lexicographers and courts: *Century Dictionary*; *State v. Shelton*, 22 Va. L. J. 329; *Brace v. Evans*, 3 Ry. & Corp. L. J. 561; *Toledo etc. Ry. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 738. In *Brace v. Evans*, 3 Ry. & Corp. L. J. 561, the court say: "The word 'boycott' in itself implies a threat." In *Toledo etc. Ry. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 738, it is said: "The word 'boycott' is usually understood as a combination of many to cause a loss to one person

by coercing others, against their will, to withhold from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them." Undoubtedly, this is the common understanding of its meaning.

The law sanctions only peaceful means, which leave every one to the exercise of his own free will. The boycott, condemned by the law, is not alone that accompanied by violence and threats of violence, but that where the means used are threatening in their nature, and intended and ⁵²⁶ naturally tend to overcome, by fear of loss of property, the will of others, and compel them to do things which they would not otherwise do. Erle, C. J., speaking of the laborer's rights, says: "Every person has a right under the law, as between himself and his fellow subjects, to full freedom in disposing of his own labor or his own capital, according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others": Erle on Trades Unions, 12; *Allen v. Flood*, 23 App. Cas. 1, 75.

There is nothing upon the record to show, nor is it claimed, that the defendants, the Teamsters' Union and the Trades Council, are unlawful combinations or organizations. The right of such organizations to exist has always been recognized. Chief Justice Shaw, in 1842, in *Commonwealth v. Hunt*, 4 Met. 111, 38 Am. Dec. 346, recognized them as lawful, and uses this illustration: "Suppose a class of workmen, impressed with the manifold evils of intemperance, should agree with each other not to work in a shop in which ardent spirit was furnished, or not to work in a shop with anyone who used it, or not to work for an employer who should, after notice, employ a journeyman who habitually used it; the consequences might be the same. A workman who should still persist in the use of ardent spirit would find it more difficult to get employment; a master employing such an one might, at times, experience inconvenience in his work, in losing the services of a skillful, but intemperate, workman. Still, it seems to us that as the object would be lawful, and the means not unlawful, such an agreement could not be pronounced a criminal conspiracy."

It is urged that courts of equity will not restrain the publication of a libel, and that this boycotting circular is a libel, the publication and circulation of which cannot be enjoined. The same claim was made that courts of equity have no jurisdiction

to restrain the commission of a crime. But the answer is, and always has been, that parties cannot ⁵²⁷ interpose this defense when the acts are accompanied by threats, express or covert, or intimidation and coercion, and the accomplishment of the purpose will result in irreparable injury to, and the destruction of, property rights. If all there was to this transaction was the publication of a libelous article, the position would be sound. It is only libelous in so far as it is false. Its purpose was not alone to libel complainants' business, but to use it for the purpose of intimidating and preventing the public from trading with the complainants. It called upon them to boycott them. The defendants, by their conduct, gave all the patrons of complainants, and others as well, the meaning they attached to the word "boycott," and they all evidently understood it as the defendants interpreted it by their conduct and acts. It is true that, under our constitution, no one can be enjoined from publishing a libel: Mich. Const., art. 4, sec. 42. By this provision, every person is entitled to "freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of such right": See *Hamilton-Brown Shoe Co. v. Saxe*y, 131 Mo. 221, 52 Am. St. Rep. 623.

We are not unmindful of the difficulty often presented to the courts to determine what constitutes an unlawful boycott, and to determine what acts come within the jurisdiction of the courts to enjoin and punish, and what belong to the legislative department to protect the public against. As already shown, injury, or even ruin, to one's business, may result from lawful competition and combination of either labor or capital, and, in such cases, the public are indirectly injuriously affected. In both England and in some of the United States these combinations, which are supposed to injuriously affect the public, have been the subject of legislation, and unlawful combinations have been defined, and punishment thereof provided. The aim of the courts has been, not to introduce into their decisions new principles, but to apply old and well-established ones, for the equal protection of all persons. In *Pasley v. Freeman*, 3 Term Rep. 63, Ashhurst, J., said: ⁵²⁸ "Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of

justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago. If it were not, we ought to blot out of our law books one-fourth part of the cases that are to be found in them."

This rule is recognized in *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. Rep. 310, and by Justice Champlin in *Burke v. Smith*, 69 Mich. 395.

The case of *Allen v. Flood*, 23 App. Cas. 1, is a forcible illustration of the difficulty, even in judicial minds, to agree. That case was really a contest between two labor unions, the Shipwrights' Provident Union and a society of boilermakers and ironworkers. The latter denied the right of shipwrights to do ironwork upon vessels. The Glengall company, for which both parties were at work, had a contract to repair a ship. Forty ironworkers and the plaintiffs, Flood and Taylor, shipwrights, were at work on the job. The ironworkers learned that plaintiffs had just before worked on a similar job, where they did ironwork, and called in Allen, their district delegate. Allen informed the agents of the Glengall company that the ironworkers would quit work unless they discharged plaintiffs. The company discharged plaintiffs, but in doing so violated no contract, as they had the right to discharge them at any time. They, however, had an expectancy of continued employment, and but for the statement of Allen would have been retained. Flood and Taylor sued Allen in tort. A recovery was had in the trial court. The case was taken to the court of appeals, and sustained by a unanimous decision. It was then appealed to the house of lords, and the opinions of eight judges were presented, six of whom were for sustaining the judgment. Of the nine lords, six were against the judgment and three for it. Of the twenty-one judges and lords, thirteen held the action of Allen to be ⁵²⁹ an unlawful interference with the freedom of labor, and actionable. This case, therefore, to other courts than those of England, is mainly instructive in the learned and exhaustive opinions rendered. The majority of the lords appear to have based their opinion upon the fact that there was no conspiracy; that the Glengall company had violated no contract in discharging plaintiffs; and that the ironworkers had the right to leave, and to threaten to leave, their employment for any reason whatever.

The decree must be modified so as to enjoin picketing, the distribution of the boycotting circular, and all acts of intimidation and coercion.

The importance of this case, and the fact that no such case has before been presented to this court, constitute **our excuse** for the unusual length of the opinion.

The other justices concurred

LABOR UNIONS—WHEN LAWFUL.—Trade unions are not unlawful combinations so long as they do not resort to acts tending to destroy freedom of action, such as intimidation, threats, or violence: *Longshore Printing Co. v. Howell*, 26 Or. 527, 46 Am. St. Rep. 640, and note. See, too, *Macauley v. Tierney*, 19 R. I. 255, 61 Am. St. Rep. 770.

CONSPIRACY.—A COMBINATION OF EMPLOYERS not to force down the price of labor, but to resist by all lawful means a combination of employes to artificially advance wages by reducing the hours of labor, is not a conspiracy: *Cote v. Murphy*, 159 Pa. St. 420, 39 Am. St. Rep. 686. And an injunction will not issue to restrain a defendant from continuing a conspiracy not to employ the complainants: *Worthington v. Waring*, 157 Mass. 421, 34 Am. St. Rep. 294.

CONSPIRACY—BOYCOTTING.—If two or more persons conspire by their intimidation or molestation to deter or influence another in the way he should employ his industry, talents, or capital, they are guilty of a criminal offense: *Crump v. Commonwealth*, 84 Va. 927, 10 Am. St. Rep. 895; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, and extended note; cases cited in note to *Spies v. People*, 3 Am. St. Rep. 492.

BOYCOTT—INJUNCTION TO RESTRAIN.—An injunction is a proper and available remedy to stay the destructive and pernicious ravages of a boycott, but the power to grant it in such cases should be cautiously exercised: *Longshore Printing Co. v. Howell*, 26 Or. 527, 46 Am. St. Rep. 640, and note. Discharged workmen will be restrained by injunction from interfering with the workmen of their former employer by threats, intimidation, ridicule, or annoyance: *Murdock v. Walker*, 152 Pa. St. 595, 34 Am. St. Rep. 678. And an injunction will issue to prevent carrying a banner or maintaining a patrol in front of complainant's place of business to interfere with its operation: *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689; *Vegelahn v. Guntner*, 167 Mass. 92, 57 Am. St. Rep. 443. See, also, *Hamilton Brown Shoe Co. v. Saxey*, 131 Mo. 212, 52 Am. St. Rep. 623. Compare *Macauley v. Tierney*, 19 R. I. 255, 61 Am. St. Rep. 770, and cases cited in note thereto.

PEOPLE v. PHILLIPS.

[118 MICHIGAN, 699.]

FORGERY—ORDER FOR PROPERTY.—The forging of an instrument requesting a dealer to let the party signing have certain property for which the latter agrees to settle, is the forgery of “an order,” within the meaning of a statute defining as forgery the false making or forging of “any order for money or other property.”

B. Wiley, for the appellant.

A. M. Cummings, prosecuting attorney, for the people.

⁶⁹⁹ MOORE, J. The respondent was convicted of forgery, under section 9213 of 2 Howell’s Statutes. The information charged, and Mr. Phillips pleaded guilty to, the forgery of an instrument reading as follows:

“Mr. Gleason, would you let me have one bottle of St. Jacob’s oil, and I will settle with you when I come to town. I have a small bill with you now.

MRS. SMITH,

“Gunnisonville.”

It is claimed that to forge such a paper is not a crime, under the statute. It is said this is not an order for property, but a mere request, and that, to constitute such an order as is intended by the statute, the drawer of the order must have a disposing power over the goods, and the person upon whom it is drawn must be under obligation ⁷⁰⁰ to accept the order: Citing Bishop on Statutory Crimes, 2d ed., secs. 328, 329; State v. Lamb, 65 N. C. 422; State v. Leak, 80 N. C. 403.

The English rule was originally as stated by the counsel for respondent, and the North Carolina cases follow the English rule; but the weight of authority is quite the other way. The words, “any order . . . for money or other property,” should be given their usual and accepted meaning. If the construction urged by counsel is to control, the evils which the statute sought to prevent may be suffered, and the offender go free. The criminally inclined would soon be so cunning as to frame the order in the form of a request, and direct it to one who was under no obligation to accept it, but who, nevertheless, would do so. The drawee of the order would be led to part with his money or property, the mischief would be accomplished, and the person wrongfully accomplishing it escape. We do not think this is consistent with the language of the statute, or the reason of its enactment: State v. Holley, 1 Brev. 35; People v.

Shaw, 5 Johns. 236; State v. Cooper, 5 Day, 250; Hoskins v. State, 11 Ga. 92; Commonwealth v. Fisher, 17 Mass. 46.

Judgment is affirmed.

The other justices concurred.

FORGERY.—AN ORDER FOR MERCHANDISE by which a pecuniary demand or obligation purports to be created, or an order or request for the delivery of property, though not addressed to anyone, is an instrument subject of forgery: Monographic note to Hendricks v. State, 8 Am. St. Rep. 468. See this note and the extended note to Arnold v. Cost, 22 Am. Dec. 319, 320. for numerous examples of instruments held to be subject of forgery.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

JOHNSON v. MINNESOTA LOAN AND TRUST Co.

[75 MINNESOTA, 4.]

STATUTORY DOWER AND CURTESY—WHEN SUBJECT TO PAYMENT OF DEBTS OF DECEASED SPOUSE.—In order to subject the statutory interest of a surviving spouse in the real estate of the deceased spouse to the payment of the debts of the latter, it must be done in the administration proceedings in the probate court.

EXECUTION—STATUTORY DOWER AND CURTESY.—The inchoate contingent statutory interest of a husband or wife in the real estate of his or her spouse is not divested or affected by a sale of the property on execution against such spouse.

EXECUTION—STATUTORY CURTESY.—Though the real estate of a wife is sold on execution under a judgment against her, one-third of it descends, upon her death, to her husband, subject, in its just proportion with the other real estate, to the payment of such debts of the deceased as are not paid from the personal estate.

Henry C. James, for the appellant.

Hahn, Belden & Hawley, for the respondent.

*** MITCHELL, J.** May I. Dayton, a married woman, was the owner of certain real estate. On January 26, 1891, this property was sold on execution on a judgment rendered against her and in favor of Corser & Co., and bid in by the judgment creditors. There was no redemption from this sale. May I. Dayton died June 8, 1891, leaving her husband, Lyman C. Dayton, surviving. In September, 1891, her husband, as special administrator of her estate, and also in his own personal right, commenced an action against Corser & Co. to set aside the execution sale, and for general relief. This action resulted in a

judgment holding the execution sale valid, but that the statutory interest of the surviving husband was not divested or affected by it, and therefore that Corser & Co., the purchasers at the sale, were the owners of an undivided two-thirds, and Lyman C. Dayton as surviving husband, of one undivided third, of the property. This judgment was affirmed by this court in *Dayton v. Corser*, 51 Minn. 406.

The same property was, in October, 1893, sold on execution under judgment rendered in April, 1893, in favor of one Engle against Lyman C. Dayton, and bid in by one Dodge, who afterward (there being no redemption from the sale) conveyed to the appellant, Johnson. In February, 1896, the executor of May I. Dayton petitioned the probate court for license to sell the property to pay debts which had been proved against her estate. It is conceded that, if the estate of May I. Dayton had any interest in the property which was subject to the payment of debts, a sale was necessary; but Johnson objected to granting the petition on the ground that the estate had no such interest, and therefore a sale under an order of the probate court would merely cast a cloud on his title. The court granted the executor's petition, and thereupon Johnson appealed to the district court, which affirmed the order of the probate court, and from that judgment Johnson appealed to this court.

The Minnesota Loan and Trust Company is administrator with the ⁷ will annexed of the estate of May I. Dayton, having been appointed in place of the executor, who had died.

The only question in the case is whether, under these facts, this undivided third of the property, which, under the statute, as construed in *Dayton v. Corser*, 51 Minn. 406, descended to Lyman C. Dayton as surviving husband, and was not divested or affected by the execution sale on the Corser judgment, is subject to the payment of its just proportion of the debts of the deceased wife which were proved as claims against her estate: Gen. Stats. 1894, sec. 4471. The only doubt or difficulty in the case grows out of the earlier decisions of this court in *Goodwin v. Kumm*, 43 Minn. 403, and *Dayton v. Corser*, 51 Minn. 406, construing this section of the statute of descents. We are now satisfied that in what was said or decided in those cases we failed to appreciate fully the differences between the common-law estates by curtesy and of dower, and the statutory interest of a surviving spouse in the real estate of his or her deceased spouse, and especially the fact that the latter (other than in the homestead) was made subject with the other real

estate to the payment of its just proportion of the debts of the deceased spouse.

In *Goodwin v. Kumm*, 43 Minn. 403, all that was required to be decided was that, if it is sought to subject the interest of a surviving spouse in the real estate of the deceased spouse for the payment of the debts of the latter, it must be done in the administration proceedings in the probate court. This is the only point upon which the decision in that case should be relied on as authority. Whatever else is said in the opinion was dicta, or, at least, unnecessary to the decision of the case.

All that was decided in *Dayton v. Corser*, 51 Minn. 406, was that the inchoate contingent statutory interest of a husband or wife in the real estate of his or her spouse is not divested or affected by a sale of the property on execution against such spouse. Thus far the decision must be adhered to as having become a rule of property, and must remain the law unless changed by statute. But the decision should not be extended one whit beyond the exact point decided, either by way of analogy or for the sake of logical consistency. Under the decision in that case one undivided third of this ^s property descended under the statute to the surviving husband wholly unaffected by the sale on the *Corser* judgment.

Why, under the same statute, did it not descend "subject, in its just proportion with the other real estate, to the payment of such debts of the deceased as are not paid from the personal estate"? It is urged that to so hold would be to take this one-third from the judgment creditor, who obtained a lien on the property during the life of the deceased, and give it to the general creditors who happened to be such at the time of her death; also that by statute a judgment is a lien on all the real estate of the debtor; also that so to hold would be to make the property twice subject to the payment of debts—first on the execution sale, and again in the administration proceedings. But it seems to us that this is begging the question, and reasoning in a circle. The lien of the *Corser* judgment was, under the doctrine of *Dayton v. Corser*, 51 Minn. 406, subject to the husband's inchoate statutory interest in the property, and if *Corser & Co.* never had or acquired any interest in or right to this inchoate interest of the husband, it cannot be said that it has been taken away from them; and if it was not sold or transferred by the execution sale, it has never been subjected to the payment of Mrs. Dayton's debts; and if it is not now subjected to their payment in the administration proceedings, it follows that it de-

scended to the surviving husband without being subjected at all to the payment of any part of the debts of his deceased wife. Of course, Dodge, the purchaser at the execution sale, and his grantee, Johnson, acquired the same rights, and no greater, in the property as those acquired by the surviving husband under the statute.

Counsel suggests that an affirmance of the judgment of the district court would result in serious practical evils by rendering titles to real estate uncertain. We see no special force in this suggestion. It would not render titles any more uncertain than in many other cases where title passes by devolution of law or through proceedings in the probate court.

The fact that there was no redemption of the other two-thirds of the property from the sale under the Corser judgment has no bearing on the case. Neither do we attach any importance to the fact that Mrs. Dayton died before the expiration of the year for redemption,⁶ and hence while the legal title of the whole property was still in her.

Judgment affirmed.

DOWER AND CURTESY—WHETHER SUBJECT TO DEBTS OF DECEASED SPOUSE.—In Indiana and Iowa a widow is entitled to one-third of the realty of which her husband has been seised during coverture, free from his debts and the expenses of administration, unless it has been sold at execution or judicial sale. In Minnesota this one-third is subject to the payment of debts and administration expenses. In Arizona and Indiana, a surviving husband takes one-third of his deceased wife's realty in fee, after payment of debts and expenses: Note to *In re Ingram*, 12 Am. St. Rep. 86, 87. See this note, pages 83-92, for the estates of dower and curtesy as modified by statutes.

DOWER.—AN EXECUTION SALE against a husband, though followed by a judicial confirmation and conveyance, does not extinguish the wife's right of dower: *Butler v. Fitzgerald*, 43 Neb. 192, 47 Am. St. Rep. 741, and note.

ALLEN v. ALLEN.

[75 MINNESOTA, 116.]

GIFTS CAUSA MORTIS.—To constitute a valid gift causa mortis, the gift must be with a view to the donor's death, to take effect only on such death by his existing illness, and there must be an actual delivery of the subject of the donation.

TO CONSTITUTE A VALID GIFT CAUSA MORTIS, there must be a delivery to the donee at the time of the donation. It is not enough that the donee had a previous and continuous possession of the gift. Hence, where the donee is a student in the donor's office, having a key to the same, a mere statement by the donor to the donee at the donor's residence that he gave the donee all the office furniture does not constitute a sufficient delivery to consummate a gift.

Child & Fryberger, for the appellant.

L. W. Gammons, for the respondent.

116 CANTY, J. Plaintiff claims the property in question as a gift causa mortis from his half-brother, Charles T. Allen, deceased. The latter was a practicing physician in Minneapolis, who resided in one place in that city and had his office at another. Plaintiff, a medical student, spent much of his time in that office. He had one key to it, and Charles T. had the other. Plaintiff resided with Charles T.

On Sunday, December 28, 1897, plaintiff went from the residence to the office, "in the usual course of business, and was there in the ordinary way." Charles T. remained at the residence, and took a dose of morphine with intent to commit suicide. He then telephoned plaintiff, and told the servant girl: **117** "Take a message and tell him [plaintiff] that he [Charles T.] gave all his things and instruments and books and bones and furniture in the office to his brother [plaintiff]."

Plaintiff immediately returned to the residence, and Charles T. then said to him: "I want you to have all my things in the office." Charles T. soon after became unconscious from the effects of the drug he had taken, and died the same evening. Plaintiff did not again return to the office until the following Tuesday.

Defendant, the administratrix of Charles T., took possession of said office furniture and other articles, and this action was brought to recover the same.

The case was tried by the court, a jury having been waived. The court found for plaintiff, and, from an order denying a new trial, defendant appeals.

We are of the opinion that there was no sufficient delivery of the property to plaintiff to constitute a gift *causa mortis*. In order to constitute a valid gift *causa mortis* (1) the gift must be with a view to the donor's death; (2) it must be conditional, to take effect only on the donor's death by his existing illness; and (3) there must be an actual delivery of the subject of the donation: *French v. Raymond*, 39 Vt. 623; 3 Pomeroy's Equity Jurisprudence, 2d ed., sec. 11, p. 1146. It is not enough that the donee had a previous and continuous possession of the gift. There must be a delivery to him at the time of the donation: *Cutting v. Gilman*, 41 N. H. 147; *Miller v. Jeffress*, 4 Gratt. 472; *French v. Raymond*, 39 Vt. 623; *Drew v. Hagerty*, 81 Me. 231, 10 Am. St. Rep. 255; 8 Am. & Eng. Ency. of Law, 1349.

In this case there was no visible change of possession, by symbol or otherwise, at the time of the alleged donation. Plaintiff did not have possession, either actual or apparent, before, and he did not have apparent possession afterward. The physical facts and conditions remained the same. The alleged delivery consisted wholly of words. Plaintiff's alleged possession was no more apparent afterward than it was before. We therefore hold that there was no valid gift *causa mortis*. This renders it unnecessary to consider any other question in the case.

The order appealed from is reversed and a new trial granted.

Buck, J., heard the argument, but declined to take part in the decision.

THE REQUISITES OF A GIFT CAUSA MORTIS are, that it shall be made in contemplation of approaching death, that it shall take effect only in case the donor dies, and that it shall be accompanied by delivery: *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Holley v. Adams*, 16 Vt. 206, 42 Am. Dec. 508, and note. See, too, *Larrabee v. Hascall*, 88 Me. 511, 51 Am. St. Rep. 440, and note.

DELIVERY OF A GIFT CAUSA MORTIS is essential to its validity: *Notes to Dunbar v. Dunbar*, 6 Am. St. Rep. 169; *Appeal of Walsh*, 9 Am. St. Rep. 87, 88. But the delivery may be constructive: *Thomas v. Lewis*, 89 Va. 1, 37 Am. St. Rep. 849, and note; and if the donee is already in possession, a gift may be consummated by an oral declaration without delivery: *Note to Stephenson v. King*, 50 Am. Rep. 180.

BENSON v. CHICAGO, ST. PAUL, MINNEAPOLIS &
OMAHA RAILROAD COMPANY.

[75 MINNESOTA, 163.]

RAILROADS—WHAT ARE RAILROAD CARS.—The words "railroad cars," in their general sense, include "hand-cars." Hence, under a statute giving a right of action to an employé who, while "engaged in operating, running, riding upon, or switching passenger or freight or other trains, engines, or cars," has been injured through the negligence of a coemployé, the words "or other cars" include hand-cars, and an employé operating a hand-car may maintain an action against the company.

Arctander & Arctander, for the appellant.

L. K. Luse and Thomas Wilson, for the respondent.

165 MITCHELL, J. This action was brought to recover damages for personal injuries sustained in the state of Wisconsin while the plaintiff, in the performance of his duty as an employé of the defendant, was engaged in propelling a hand-car over defendant's railway; the injury being caused by the alleged negligence of other employés of the defendant, in carelessly and without notice running another hand-car into and against the one which the plaintiff was propelling.

The action was brought under the laws of Wisconsin of 1893, chapter 220, and the only question is whether the facts alleged in the complaint bring the case within the provisions of this statute. The statute so far as here material, reads as follows: "Every railroad or railway company operating any railroad or railway, the line of which shall be in whole or in part within this state, shall be liable for all damages sustained within this state, by any employé of such company, without contributory negligence on his part, . . . while any such employé is so engaged in operating, running, riding upon, or switching passenger or freight or other trains, engines, or cars, and while engaged in the performance of his duty as such employé, and which such injury shall have been caused by the carelessness or negligence of any other employé, officer, or agent of such company in the discharge of, or for failure to discharge, his duties as such."

Defendant's counsel concede that the facts alleged bring the case within all the conditions of the statute, except that the plaintiff at the time he received the injury was not "engaged in operating, running, riding upon, or switching passenger or freight or other trains, engines, or cars," within the meaning of

the statute, their particular contention being that the words "or other cars" do not include hand-cars; that in view of the connection in which they are used, and under the familiar rules of *noscitur a sociis* and *ejusdem generis*, the words "or other cars" must be limited to cars of like kind to those previously enumerated, viz., "passenger and freight [cars], or other trains and engines"; that is, to cars used on trains operated on the road, and intended to be propelled, and usually propelled, by steam. And this contention they seek to enforce by the suggestion that in popular speech the words "railway cars," without any qualifying or explanatory prefix, do not include hand-cars.

¹⁰⁶ So far as we are advised, this act has come before the supreme court of Wisconsin for consideration only in the cases of *Smith v. Chicago etc. Ry. Co.*, 91 Wis. 503; *Ean v. Chicago etc. Ry. Co.*, 95 Wis. 69; *Andrews v. Chicago etc. Ry. Co.*, 96 Wis. 348; and, by implication, in *Hibbard v. Chicago etc. Ry. Co.*, 96 Wis. 443.

Unfortunately for us, in none of these cases was the question now presented considered or decided. Only two questions as to the construction of the statute seem to be settled by these cases, viz.: 1. That, to bring a case within its provisions, the employé must have received his injuries while "engaged in operating, running, riding upon, or switching passenger or freight or other trains, engines, or cars"; and 2. That it is immaterial by what kind of power the cars, etc., are being propelled at the time the employé receives the injuries. We have, therefore, to meet the question as *res integra*.

The purpose or aim of all rules of statutory construction is to ascertain the legislative intent. They are all but aids to this end. It is perfectly evident from the general scope of the act, and from the context, that the word "cars" refers only to railroad cars. To that extent it is legitimate to resort to the rules of construction invoked by defendant's counsel. The words "railroad cars," in their general sense, include "hand-cars," for they are constructed and used for running on the lines of rails of a railroad, being propelled by hand by those riding on them, through the aid of cranks and gearing. They would, therefore, be within the purview of the statute, unless there is something in the context or in the subject matter or the object of the act which shows that the legislature did not intend to include them.

It is very manifest that the statute was designed for the protection and benefit of the class of railway employés engaged in operating, running, or riding upon railroad cars, trains, and en-

gines, while so engaged in the performance of their duty, by giving them a right of action for injuries thus received caused by the negligence of their fellow-servants. It doubtless proceeds upon the theory that railway employes while thus engaged, are exposed to peculiar and extraordinary perils from the negligence of their coemployes, ¹⁶⁷ against which they are, for various reasons, especially unable to protect themselves.

These considerations apply to those operating or riding upon hand-cars as well as to those operating or riding upon any other railroad cars, not to the same degree, perhaps, as to dangers connected with the motive power of the car operated or ridden upon, but to an even greater extent as to dangers resulting from the negligence of those operating or running other cars, trains, or engines. In short, operating, running, or riding upon hand-cars is "within the mischief" of the statute, and there is apparently no good reason why the legislature should have excluded it. This is not necessarily conclusive, but it is a good reason why a court should not exclude it by construction, unless it is clear from the language of the statute that the legislature so intended. We find nothing in the statute that would justify a court in holding that the legislature intended to exclude hand-cars from its operation.

A court has no right to resort to the maxims of *noscitur a sociis* or *eiusdem generis* for the purpose of reading into a statute a distinction which the legislature neither made nor intended to make. These rules are not the masters of the courts, but merely their servants, to aid them in ascertaining the legislative intent. They afford a mere suggestion to the judicial mind that, where it clearly appears that the lawmakers were thinking of a particular class of persons or objects, their words of more general description may not have been intended to embrace any other than those within the class. Hand-cars are used in the ordinary business of railroads. As already suggested, their use is within the mischief of the statute.

There is nothing in the statute requiring that the car be connected with a locomotive, or with other cars forming a train, or that it must be made to be propelled by any particular kind of power, in order to bring a case within its operation. We do not think that the fact that the word "cars" is enumerated with "trains" and "engines" restricts its meaning to cars propelled by engines, or to cars usually operated as part of a train. Eliminating, as we think we may for present purposes, the words

"trains" and "engines," ¹⁶⁸ this clause would read, "while engaged in operating . . . passenger or freight or other cars."

Order reversed.

RAILROAD—INJURIES BY HAND-CARS.—On the liability of railroad companies for injuries suffered from hand-cars, see *Houston etc. Ry. Co. v. Bolling*, 59 Ark. 395, 43 Am. St. Rep. 38, and note.

DICKSON v. KITTSOON.

[75 MINNESOTA, 168.]

THE TRUSTEES OF A SAVINGS BANK occupy a fiduciary relation to its depositors in respect both to the investment of deposits and to the election of other trustees.

SAVINGS BANKS—AGREEMENT TO ELECT TRUSTEE—ILLEGAL CONSIDERATION.—An agreement with a trustee of a savings bank, upon a consideration moving to him for his private benefit, to secure the election of certain persons as trustees is illegal as against public policy, and a note given for such a promise is void.

NEGOTIABLE INSTRUMENTS—ONE TAKING WITH KNOWLEDGE OF CONSIDERATION.—Where notes given for an illegal consideration are made payable to a savings bank, the trustees of which have full knowledge of the consideration, the bank does not occupy the position of an innocent indorsee, although the trustees may have thought the consideration was legal.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—AN ASSIGNEE for the benefit of creditors stands in no better position than his assignor, the insolvent debtor, and a defense against the latter is a defense against the former, except so far as his rights and powers are changed by statute.

NEGOTIABLE INSTRUMENTS.—THE MAKER OF A NOTE IS NOT ESTOPPED from setting up the illegal character of its consideration, as against one who takes such note with full knowledge of what the consideration was, or as against his assignee in bankruptcy.

J. J. McCafferty, H. Weiss, and Samuel Morrison, for the appellant.

Frederick N. Dickson and Timothy D. Sheehan, for the respondents.

¹⁷⁰ **MITCHELL, J.** The Minnesota Savings Bank of St. Paul was a savings association organized under the Laws of 1867, chapter 23. William F. Bickel was its vice-president, general manager, and one of its five trustees. On January 3, 1895, Bickel and the defendants entered into a written agreement, whereby, in consideration of twenty-two thousand dollars to be paid by the latter to the former, Bickel agreed "to assign, set

over, transfer, sell, and deliver to [the defendants] an undivided one-half interest in and to the charter, franchise, business, goodwill, and profits of the Minnesota Savings Bank," and "to effect and cause to be effected whatever proceedings and things that shall be necessary to be had and done to give and deliver to [the defendants] said full undivided one-half interest above described, and shall place the organization of the board of trustees of said corporation in such condition that shall give effect to said agreement."

The defendants, on their part, agreed "to nominate their proportion of said board of trustees," and it was mutually agreed that "the nomination and election and qualification thereof [defendants' proportion of the board of trustees] shall constitute an acceptance and fulfillment of this contract" on part of Bickel. As the consideration for this contract, the defendants executed and delivered to Bickel their promissory notes for twenty-two thousand dollars.

Instead of taking these notes payable to himself, Bickel caused them to be made payable to the order of the savings bank. He then turned them over to the bank, and on receipt of them the board of trustees transferred or surrendered to him certain assets of the bank (of the amount or value of which there is no evidence), which he has attained and appropriated to his own use. These notes, and notes given in renewal of some of them, were entered and carried on the books of the bank as part of its bills receivable up to and at the time the bank failed and closed its doors, on January 18, 1897.

At a meeting of the board of trustees held a few days after the ¹⁷¹ notes were executed, and on the next day after Bickel had turned them over to the bank, at the instance of Bickel two of their number resigned, and the two defendants were elected trustees in their places. The defendants accepted and qualified and acted as trustees, to the extent, at least, of occasionally attending the meetings of the board, until the bank failed.

For seven or eight months in 1895 the defendant Kittson was on the payroll of the bank as a salaried employé, his duties being, nominally, at least, to look after the real estate belonging to the bank.

There was evidence tending to prove that the defendant Kittson knew that the notes were held by the bank as part of its assets, but there was no evidence that he knew that the bank had ever parted with anything of value for them. He never paid anything on them, but on one occasion gave a renewal note for

one of them, and on another gave a note for accrued interest on the original notes. He never took any steps to rescind the agreement with Bickel, or to recover his notes, and, so far as appears, never repudiated his liability upon them until this action was commenced.

On January 18, 1897, the bank closed its doors and executed to one William Bickel an assignment of all its assets for the benefit of its creditors. The assignee having resigned, the court appointed the plaintiffs receivers in his place; and they brought this action upon the notes, but Kittson alone was served with process, or appeared in the action. He interposed as defenses his incapacity to contract, by reason of drunkenness, false and fraudulent representations by Bickel and his codefendant, Baker, and the want of any good or valid consideration for the notes. We find it unnecessary to consider any of these defenses except the last.

When the evidence closed, each party requested the court to direct a verdict in their or his favor, whereupon the court directed a verdict in favor of the plaintiffs, to which the defendant excepted, and, after verdict, moved the court for judgment notwithstanding the verdict, and, in case that was denied, for a new trial. The court refused to grant either and thereupon the defendant appealed.

1. In view of the fact that a savings association organized under ¹⁷² the act of 1867 has no capital stock, and that the nature of its business and the extent of its powers, as fixed by statute, are to receive deposits "and invest the same for the use, interest, and advantage of the said depositors," and the further fact that neither the corporate franchise nor the office of trustee is assignable, it may admit of argument as to what, if any, right of property a trustee has in either the franchise or the assets of such an association, which he can assign. But assuming, as we shall, that there was a consideration for the notes, it was clearly an illegal one, on the ground that it was against public policy.

While, on the face of the written agreement, Bickel agrees to assign and transfer to Kittson and Baker an undivided half interest in the bank, yet, upon reading the whole instrument, the sole and only means by which this was to be accomplished was by bringing about a change in the organization of the board of trustees. Hence, when reduced to its last analysis, the sole consideration for these notes was Bickel's agreement to secure the

election of Kittson and Baker, or those whom they might designate, to the office of trustees of the bank. The agreement expressly provides that this should constitute a fulfillment of the contract on Bickel's part. This was clearly an illegal agreement.

The office of trustee of an association of this kind is a fiduciary one of the most sacred character. The incumbents of such an office are trustees for the depositors. Their fiduciary relation extends, not merely to the investment of deposits, but also and equally to the election of other trustees, who, with themselves, are to care for and look after the interests of depositors. It is a part of their trust duty to exercise this power of election, not for their own personal advantage, but for the best interests of depositors, and to see that, as far as in them lies, they secure the highest attainable degree of integrity, ability, and fidelity for the management of the affairs of the association. No greater breach of trust can be conceived than that of trustees of such associations selling or bartering the office of trustee for their own private gain, without regard to the interests of their cestuique trust, the depositors. ¹⁷³ And there could not well be any more flagrant example of this than is disclosed by the record in this case, when Bickel, for his own private gain, with the consent and assistance of his colleagues, secured the election to the office of trustee of a dissipated spendthrift of the age of twenty-one years, without either business ability or experience, and of another who must have been almost equally unfit for the position; for, from what appears in the record, he must have been either as devoid of business sense and judgment as Kittson, or else the fraudulent accomplice of Bickel to inveigle Kittson into this most foolish and improvident bargain. The contract between Bickel and the defendants was manifestly void on grounds of public policy, and the notes were equally void because given for an illegal consideration.

2. The bank stood in no better position than Bickel. It did not occupy the position of an innocent indorsee, for the notes were made payable directly to it. Moreover, the evidence discloses that the trustees knew all about the agreement between Bickel and the defendants and what the consideration for the notes was before they took them from Bickel. Knowing the facts, it is immaterial that they may not have understood the law applicable to those facts.

The plaintiffs, as receivers, stood in the shoes of the original assignee; and an assignee for the benefit of creditors stands in no

better position than his assignor, and what would be a defense against the latter will be a good defense against the former, except so far as his rights and powers are changed by statute. Our statute (Gen. Stats. 1894, sec. 4233) provides that, in general assignments for the benefit of creditors, the assignee represents the rights of creditors, as against all transfers of property by the debtor which would be held to be fraudulent or void as to creditors; and the Insolvent Act of 1881 gives an assignee or receiver the right to bring an action to avoid an unlawful preference of one creditor over another: Gen. Stats. 1894, sec. 4243. Otherwise their rights and powers, so far as here material, are the same as at common law.

There is nothing in the facts of this case to bring it within either ¹⁷⁴ of these statutory provisions. Neither is there anything in the facts upon which the doctrine of equitable estoppel can be successfully invoked. We have set out in our statement of facts everything which could have any possible bearing upon that subject.

Order reversed and cause remanded, with directions to the court below to render judgment in favor of the defendant, notwithstanding the verdict.

NEGOTIABLE INSTRUMENTS—FRAUDULENT INCEPTION. When a negotiable instrument is originally infected with fraud, invalidity, or illegality, the title of the original holder being destroyed, the title of every subsequent holder which reposes on that foundation, and no other, falls with it: *Cover v. Myers*, 75 Md. 406, 32 Am. St. Rep. 394.

AN ASSIGNEE FOR THE BENEFIT OF CREDITORS takes no higher or better right to the assigned assets than his assignor possessed: *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608; *Akin v. Jones*, 93 Tenn. 353, 42 Am. St. Rep. 921, and note.

LYMAN v. GAAR.

[75 MINNESOTA, 207.]

ATTACHMENT — UNRECORDED CONVEYANCE.—A conveyance is void, as against attaching and judgment creditors, only when the attachment or judgment is against the person in whose name the title to the land appears of record. Hence, where a judgment creditor attaches land to which the judgment debtor never had any title of record, his only interest being under a contract of purchase which had been previously assigned, the judgment creditor acquires no interest as against the assignee of the contract of purchase.

John M. Rees, for the appellant.

E. F. Crawford, for the respondent.

208 **START, C. J.** Action under the statute to determine adverse claims to real estate. The trial court found that the plaintiff was the owner in fee simple of the land described in the complaint, and that the defendant had no title to, interest in, or lien upon it, and that judgment be so entered. The defendant appealed from the judgment.

The only claim asserted by the defendant to the land by its answer was that on January 10, 1895, it levied upon all the right, title, and interest of Henry A. Buzzell in the land, by virtue of a writ of attachment issued in an action then pending wherein it was plaintiff and he was defendant; that at the time of such levy the land belonged to Buzzell, although the legal title thereto was not in his name. The answer also alleged that a judgment was thereafter, and on July 12, 1895, entered in such action in its favor, and against Buzzell, for seven hundred and fifty-two dollars and forty-five cents, which has not been paid.

The reply admitted that the attachment was issued as alleged, and that on January 10, 1895, a copy thereof, purporting to levy upon all of the interest of Buzzell in the land, was filed in the office of the register of deeds of the proper county; also the recovery of the judgment, and that it had not been paid; but it alleged that Buzzell had no interest in the land when the attachment was issued.

The evidence on the trial tended to show that on November 1, 1894, the Henry A. Buzzell mentioned in the answer held a contract for the purchase of the land in question from the St. Paul and Chicago Railway Company, upon which he had made partial payments; that on or about the day named he sold and assigned his contract to the plaintiff; and, further, that there-

after the plaintiff surrendered the contract and the assignment thereof to the railway company, paid to it the balance of the purchase price of the land according to the terms of the contract, and thereupon the railway company made and delivered to him its warranty deed of the land, in which its trustee, the Farmers' Loan and Trust Company, joined.

There was neither evidence nor claim on the trial that Buzzell ever had any other interest in the land except such as he acquired by his contract from the railway company, and there was neither ²⁰⁰ evidence nor claim that the contract, or the assignment thereof, had ever been recorded.

The defendant assigns as error the admission of the evidence tending to establish the foregoing facts, especially the admission of parol evidence of the contract and its assignment, which were in writing. Sufficient proof was made of the then non-existence of the writings to justify the admission of the secondary evidence. It is also urged that the admission of the deed from the railway company to the plaintiff was error.

The deed was properly executed and acknowledged, and was competent and material evidence, in connection with the other evidence in the case, to which reference has already been made. It is true, as defendant claims, that there was no evidence, other than as we have stated, that the railway company ever owned the land; but the defendant alleged in its answer that Buzzell was the owner of the land, although he did not hold the legal title, and claim was only through him.

The plaintiff having established *prima facie*, at least, that the only interest Buzzell ever had in the land was by virtue of his contract for the purchase of it from the railway company, and that all of his interest passed by the assignment to the plaintiff, it was competent to show that the latter had complied with the contract and received a deed of the land. This was sufficient proof to compel the defendant to show that it had some other and better right to the land.

The defendant, however, claims that the unrecorded assignment of Buzzell's contract was void as against its attachment and judgment by virtue of our registry law (Gen. Stats. 1894, sec. 4180), which, so far as here material, is in these words: "Every conveyance by deed . . . or otherwise . . . shall be recorded in the office of the register of deeds of the county where such real estate is situated; and every such conveyance not so recorded shall be void . . . as against any attachment levied thereon, or any judgment lawfully obtained, at the suit

of any party, against the person in whose name the title to such land appears of record."

Independent of this statute, the rights of attachment and judgment ²¹⁰ creditors are precisely as they were at common law; that is, the lien of the levy or judgment attaches only to the actual interest the debtor had in the land at the time of the levy or docketing of the judgment.

And where, as in this case, the creditor seeks to subject the property of a third party to the payment of his debt against a prior owner thereof, he must bring himself within the statute. The defendant has not done so in this case. The meaning of this statute is not doubtful. It places attaching and judgment creditors on a footing with bona fide purchasers as against an unrecorded conveyance, only where the attachment or judgment is against the person in whose name the title to the land appears of record; that is, it allows their liens to attach to the lands of their debtors according to the title as it appears of record prior to the recording of such conveyance, and not as it exists in fact: *Dickinson v. Kinney*, 5 Minn. 332 (409); *Coles v. Berryhill*, 37 Minn. 56; *School District v. Peterson*, 74 Minn. 122, 73 Am. St. Rep. 337.

In this case Buzzell never had any title of record to the land; hence, the unrecorded assignment of his contract for its purchase was not void as against the defendant's attachment and judgment, and the defendant acquired no lien on, or interest in, the land by its attachment and judgment. It stood simply in Buzzell's shoes, and as he then had no interest in the land, the defendant obtained none.

The finding and decision of the trial court, to the effect that the defendant has no interest in, or lien on, the land, but that the plaintiff is the owner thereof, are sustained by the evidence.

Judgment affirmed.

ATTACHMENT.—AN UNRECORDED DEED is effectual as against a subsequent attachment of the land as the property of the grantor: *Note to Hope v. Blair*, 24 Am. St. Rep. 373. Compare *Roberts v. Bourne*, 23 Me. 165, 39 Am. Dec. 614. As to the priority of attachment liens over subsequent conveyances, see the extended notes to *Franklin Bank v. Bachelder*, 39 Am. Dec. 607; *Jackson v. Ramsay*, 15 Am. Dec. 253.

ROMER v. ST. PAUL CITY RAILWAY COMPANY.

[75 MINNESOTA, 211.]

STREET RAILWAYS—POWER TO LAY SWITCHES AND CURVES.—Where a street railway company is authorized to operate its system along certain streets of a city, and to make connections with its power-houses and car barns, it has power to lay switches and curves for the purpose of getting its cars in and out of its barns upon any of the streets adjoining its barns, and is not confined to the streets upon which it is expressly authorized to operate its system.

NUISANCE—LOUD NOISES IN SWITCHING CARS.—Where the exclusive business of a street-car company is the carrying of passengers within the limits of a city, and its duty to the public requires that its car barns shall be so located that it can promptly get its cars upon its lines for the purpose of serving the public, and it is not authorized to locate its barns outside the city, the location of a barn in a residence portion of a city is not improper or unreasonable; and loud and disagreeable noises necessarily occasioned in switching cars in and out of such barn early in the morning and late at night, whereby one is disturbed in the enjoyment of his property, is not an actionable nuisance.

STREET RAILWAYS—SWITCHES NOT ADDITIONAL BURDEN ON STREET.—The maintenance and use of switches and curves, which are a necessary incident to the operation of a street-car system, are a proper street use and not an additional burden thereon.

O. E. Holman, for the appellant.

Munn & Thygeson, for the respondent.

214 START, C. J. This was an action for damages against the defendant for so maintaining and operating its street-car barn and switching the cars in and out of it as to constitute a nuisance, whereby the rental value of the plaintiff's real estate was impaired. At the close of the evidence the trial court directed a verdict for the defendant, and the plaintiff appealed from an order denying his motion for a new trial.

Competent evidence was introduced on the trial which was sufficient, taking the most favorable view of it for the plaintiff, to establish the following facts: Ramsey street and Smith and Thompson avenues are public streets within the city of St. Paul. The plaintiff has owned for some years, and still owns, the real estate described in the complaint, abutting upon the street and avenues named, which is occupied by dwelling-houses and flats, as stated in the complaint. The defendant is a corporation for the purpose of operating street railway lines in the city of St. Paul, and has been so engaged since 1872, and for the past nine years it has been engaged in operating a general

system of electric street railways in the city, composed of various lines; but each line is practically a part of every other line, so that a passenger boarding the car on any particular line can, by means of a transfer, required by ordinance, on payment of one fare, ride to any point on any other line embraced within the system. One of the lines of this system is operated along Ramsey street, and is known as the "Grand avenue line," which connects with or crosses all the other lines of the system.

The defendant is the owner of the land bounded by Ramsey street and Thompson and Smith avenues, upon which is located the car barn in question, which fronts on Ramsey street. It has been the owner of this land, and has maintained a car barn thereon and operated its cars in and out of it, for many years. Since 1890 electricity has been the motive power used on the defendant's lines, and since that date it has operated on Ramsey street its Grand avenue ²¹⁵ line in front of the plaintiff's property, at which point it has used a cross-switch.

At the intersection of Ramsey street and Thompson avenue it has maintained and used two curves; at Smith and Ramsey, two other curves; on Thompson avenue, one curve; and on Smith avenue, five curves. It has maintained single spur tracks on Thompson and Smith avenues, extending a short distance beyond the barn, to facilitate the getting of its cars in and out of the barn. For about six years before the commencement of the action these curves and tracks were used for the purpose of switching electric cars and motors into and out of the barn. The barn floor is covered with tracks, on which the defendant has stored, on an average, sixty to seventy cars.

The location of the barn is practically a residence district, but it is within a few blocks of the business part of the city, with a lumber yard and several shops and stores in its immediate vicinity. The defendant's employes begin about 4 o'clock in the morning to take the cars out of the barn with the switching motor, and put them in position on the streets around the barn for distribution over the system. The cars are brought back in the evening, and are taken into the barn up to 1 o'clock in the morning.

In switching and distributing the cars a great noise is made, which is heard every morning from 4 to 6 o'clock, and again in the evening to 1 o'clock in the morning. The cars are taken out of the barn on Thompson avenue, and around the curves to Ramsey street, and run over the switches in front of the plaintiff's brick block. In running around the curves the cars

produce a sharp, grinding noise, and in making up the trains and pulling them out there is a bumping noise.

The alleged nuisance consisted of the loud and disagreeable noises caused by the defendant so switching its cars in and out of the barn, and running them over and across the curves on Thompson and Smith avenues and over the switch in front of the plaintiff's block on Ramsey street; also by the ringing of the gongs on the cars, the loud talking of the defendant's employés in charge of them, and the hammering in cleaning and repairing the cars in the street. The noises so produced were such as to disturb the rest and ²¹⁶ comfort of the plaintiff, his tenants and other property owners in the vicinity of the car barn, by keeping them awake until late at night, and rousing them in the early hours of the morning; and, further, in the obstruction of the streets in front of plaintiff's property by permitting its cars to stand thereon, and by bringing coal, wood, sand, and other material to be used in the operation of its electric lines, and unloading them upon the street at or near the barn. The rental value of the plaintiff's property has been in some measure reduced by the alleged nuisance.

It was substantially admitted by the plaintiff on the argument of this appeal that the defendant was not guilty of any negligence in the construction, maintenance, and operation of its street railway tracks, curves, switches, cars, and barn at the point in question. It was also conceded on the trial that no negligence in the premises had been proven. As to the repairs of the cars in the street, the evidence shows that they were such as were occasionally necessary to put the cars in a condition to be moved. The obstruction of the streets by the cars was temporary. In short, there is no evidence tending to show that the temporary obstruction of the street by the cars, or the repairing of them therein, or the unloading of the material on the street, resulted in any special injury to the plaintiff different from that sustained by the general public: *Brakken v. Minneapolis etc. Ry. Co.*, 29 Minn. 41.

The real question, then, in this case, is whether the loud and disagreeable noises necessarily occasioned by the defendant in running its cars over its switches and curves in the streets, late at night and early in the morning, whereby the plaintiff is disturbed in the enjoyment of his property, is an actionable nuisance. The plaintiff, while conceding that the defendant has a right to maintain its car barn at the intersection of these streets, and to construct sidetracks and switches on Ramsey

street, claims it has no such right on Smith and Thompson avenues, and no legal right to switch its cars in and out of its barn over the tracks and curves upon the avenues.

In 1872 the city of St. Paul, by ordinance No. 57, granted to the defendant the right to construct, maintain, and operate, with animal power only, street railway lines over and along certain of the streets of the city, including the streets here in question. The ²¹⁷ defendant under this ordinance laid its tracks on Ramsey street, and also on Thompson and Smith avenues, adjacent to its barn at that point, and has ever since maintained them there.

In 1889 the city, by ordinance No. 1227, granted to the defendant the right, and it was authorized, to construct, maintain, and operate its street railway system by cable, electric, pneumatic, or gas power, at its option, in, over and along certain designated streets of the city with all necessary sidetracks, switches, poles, wires, conduits, and appliances. Ramsey street was among those so designated, but neither Thompson nor Smith avenue was mentioned in the ordinance.

In 1891 the city, by ordinance No. 1502, granted to the defendant authority so to construct and maintain poles, needful wires, and apparatus as to make connections with any of its electric power houses and stations, for the purpose of more fully perfecting its system upon certain streets and avenues therein named, and upon any streets on which the defendant then or thereafter might have its street railway tracks.

We find in these ordinances no express grant to the defendant to maintain the curves and switches in the avenues in question for the purpose of taking its cars in and out of its barn, but the right to do so was given by necessary implication.

It is true that all public grants, unlike private ones, are construed strictly and favorably for the grantor, the public. But it is equally true that where a grant is made for the benefit of the grantee, and also for the express accommodation and benefit of the public, everything which is reasonably proper and necessary (not simply convenient) to effect the essential objects of the grant passes by necessary implication. Otherwise the purpose of the grant would be seriously impaired, if not wholly defeated.

It is practically impossible for the defendant to operate its street railway system without car barns in which to place its cars when not in use, for it would be intolerable to permit them to stand upon the streets. The only practical way to get the

cars in and out of its barns is by the use of the usual motive power, and the use of tracks and curves on the streets adjacent to the barns. It would be a very narrow and technical construction of these ordinances to hold that ²¹⁸ the defendant was authorized to lay switches and curves for the purpose of getting its cars in and out of its barns only on the streets upon which it was expressly authorized to operate its street railway system.

Where, as in this case, its barn fronts on a street upon which it is authorized to and does operate its street railway system, and it is reasonably necessary to take its cars in and out of the barn from the streets on each side of the barn, it has the right to do so by virtue of the ordinances, although it has no right to operate its electric lines thereon: Booth on Street Railways, sec. 95.

This conclusion, however, does not dispose of this appeal; for while it is true, as a general proposition, that what is authorized to be done by law cannot be a public nuisance, yet it may be a private nuisance as to individuals who are specially injured thereby: 2 Wood on Nuisances, sec. 557.

The question still remains whether the loud and disagreeable noises occasioned by the running of the defendant's cars in and out of its barn over the curves and switches on the streets at the place and at the hours in question, although authorized by the city ordinances, constitute an actionable nuisance as to the plaintiff.

The answer to this question—there being no negligence in the case—depends on whether the location of the defendant's car barn was a reasonable and proper one, and whether the use of the streets at the times and in the manner they were used by the defendant in running its cars over the curves and switches, whereby the noises complained of were produced, was one of the reasonable uses or purposes for which the streets were acquired.

The plaintiff cites and relies on a class of cases to the effect that, where a party is carrying on a lawful business on his own land without negligence, yet if it is a business which is attended with loud and disagreeable noises, or produces noisome smells or noxious vapors, whereby the property and comfort of those dwelling in the neighborhood are materially injured and disturbed, the business is a nuisance per se. Such cases, however, are not particularly in point, for this is not the case of carry-

ing on an offensive trade or business on one's own premises which may be carried on at places removed from the occupied parts of a city or beyond its limits.

²¹⁰ The case of *Baltimore etc. Ry. Co. v. Fifth Baptist Church*, 108 U. S. 317, also relied on by the plaintiff, is more nearly in point than any other cited. But that case is clearly distinguishable from the one at bar. It was a case where a commercial railway company, whose motive power was steam, located its engine-house and machine-shop immediately adjoining a then existing church edifice, which was, and had been for some years prior to such location, continuously used by the church as its house of worship. The hammering in the shop, the passing of the engines in and out of the roundhouse, the blowing of whistles, the sounding of the bells and the cinders and offensive odors, created a constant disturbance of the religious exercises of the church. Such acts were held to constitute an actionable nuisance, and it was held that the church was entitled to damages in the premises. This was clearly a case of an improper and unreasonable location of its roundhouse and machine-shop by the railway company, with reference to which the court, in its opinion, at page 334, said: "There are many places in the city sufficiently distant from the church to avoid all cause of complaint, and yet sufficiently near the station of the company to answer its purposes."

But there is a radical difference between an ordinary commercial railway operated by steam and a surface street railway operated by electricity, as to the selection of its roundhouses and machine-shops by the one and its car barns by the other. In each case the selection must be made with reference to the rights of property owners in the neighborhood; also, those of the railway company and of the public. The rights and convenience of property owners cannot alone be considered, for one living in a city must necessarily submit to the annoyances which are incidental to urban life, and individual comfort must in many cases yield to the public good.

Now, the only ground for claiming in this case that the location of the defendant's car barn was an improper one is that it is in the residence portion of the city. But the exclusive business of the defendant is the carrying of passengers within the limits of the city and in its streets. Its lines traverse the streets of the residence portion of the city. Its business is there. It takes on and discharges ²²⁰ passengers in all parts of the city. It must have its car barns so located that it can

promptly get its cars upon its lines for the purpose of enabling the people of the city to seasonably get from their homes to their respective places of business or labor. It cannot locate its barns outside of the city, because it is only authorized to build and operate its lines within the city limits and upon its streets, and, if it had the authority to do otherwise, it would be impracticable and detrimental to public interests to do so.

Again, if it locates its barns at points where there are at present no dwelling-houses, it is only a matter of time when some property owner will be disturbed by the loud and disagreeable noises necessarily occasioned by taking its cars in and out of the barns. The rights of such an owner are the same as those of the plaintiff. The barn in question is only one of five barns located and used by the defendant for the same purpose in different parts of the city, and the evidence conclusively shows that its location is not an improper or unreasonable one.

The further question, whether the maintenance and use by the defendant of the switches and curves in question are a proper street use, is settled adversely to the plaintiff by the previous decisions of this court. Such maintenance and use are a necessary incident to the operation of its street-car system, which derives its business from the streets, is intended for the convenience of the travel therein, and is in aid of the identical use for which the streets were acquired; hence, the maintenance and operation of these switches and curves are a proper street use, and not an additional burden thereon: *Newell v. Minneapolis etc. Ry. Co.*, 35 Minn. 112, 59 Am. Rep. 303.

The discomfort and injury sustained by the plaintiff from the loud and disagreeable noises produced by taking the cars of the defendant in and out of its barn over the switches and curves at the place and at the times in question are the same, except in a greater degree, as are sustained by property owners at the street corners where its cars are operated over curves. The acts of the defendant complained of do not constitute a private nuisance for which the plaintiff is entitled to recover damages.

Order affirmed.

STREET RAILWAYS—ADDITIONAL SERVITUDES.—The authorized use of a public street for street railroad purposes, no matter what the motor power may be, is not the imposition of an additional servitude, and does not entitle the abutting landowners along the street to compensation for such use: *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 30 Am. St. Rep. 763; *Chicago etc. Ry. Co. v. Whiting etc. St. Ry. Co.*, 139 Ind. 297, 47 Am. St. Rep. 264, and note.

NUISANCE.—AN ENGINE-HOUSE erected by a railroad company adjacent to a dwelling-house constitutes an actionable nuisance: Note to *Pennsylvania R. R. Co. v. Angel*, 56 Am. Rep. 6. A fire-engine house in a city is not a nuisance per se: *Van De Vere v. Kansas City*, 107 Mo. 83, 28 Am. St. Rep. 396.

MATHER v. CURLEY.

[75 MINNESOTA, 248.]

TAX SALE.—A NOTICE OF THE EXPIRATION OF THE TIME TO REDEEM from a tax sale stating "that the time allowed by law for redemption from said sale will have expired after sixty days have elapsed after service of this notice has been made, and proof thereof and of the sheriff's fees has been filed in this office," is void, because it fails to state when the time to redeem will expire.

Benton & Molyneaux and S. A. Reed, for the appellant.

A. T. Ankeny, for the respondent.

248 CANTY, J. This is an action to determine adverse claims to real estate. The trial court found for defendant, and plaintiff appeals from an order denying a new trial.

The notice of expiration of redemption from the tax sale stated: "That the time allowed by law for redemption from said sale will have expired after sixty days have elapsed after service of this notice has been made, and proof thereof, and of the sheriff's fees, has been filed in this [the county auditor's] office."

Respondent contends that this notice is void because it does not state when the time to redeem will expire, and, in our opinion, the point is well taken. The notice does not state that the time to redeem will expire at the end of the sixty days, but that it will have expired after the sixty days; that is, it will have expired some time after the end of the sixty days, but whether it is one day or one month or one year after is not stated.

In *State v. Nord*, 73 Minn. 1, 72 Am. St. Rep. 594, we held that a notice which states a longer time than the statutory period is void, as well as one which states a shorter time: See *Peterson v. Mast*, 61 Minn. 118. But it seems to us that no **249** time at all is stated in this notice. It amounts to a statement that the time to redeem will not expire for at least sixty days. Then, we are of the opinion that the notice is void.

It is true, as claimed by appellant, that the court below did not dispose of the case on this point. But it is, in our opinion, the most clear and satisfactory point on which to dispose of it. It was not, as appellant contends, necessary for defendant to appeal in order to raise this point. He is entitled to raise any point which shows conclusively that, on the findings of fact, he is entitled to judgment.

Order affirmed.

TAX SALE—NOTICE TO REDEEM.—A statute providing for notice of the time when the right to redeem from a tax sale expires is mandatory, and such time must be stated clearly and correctly in the notice. If the time fixed in the notice is ninety days, when the statute prescribes sixty, the notice is invalid: *State v. Nord*, 73 Minn. 1, 72 Am. St. Rep. 594, and note. Compare *Hicks v. Nelson*, 45 Kan. 47, 23 Am. St. Rep. 709, which holds that a notice to redeem land sold for taxes, giving the date of sale from which the expiration of the time for redemption may be computed, is not invalid for uncertainty or indefiniteness. See, also, *Clary v. O'Shea*, 72 Minn. 105, 71 Am. St. Rep. 465.

VAN DUSEN-HARRINGTON COMPANY v. JUNGBLUT.

[75 MINNESOTA, 298.]

PLEADING—GAMBLING TRANSACTION.—To make the defense that an agreement is a gambling transaction, a defendant must set up such illegality in his answer.

BROKERS—AUTHORITY TO ADVANCE MONEY.—Where one authorizes a broker to purchase wheat for him, and upon being told of the purchase and requested to send his check remits a deposit, and later puts up additional margins without being asked for them upon discovering that his margins were exhausted, this indicates such a course of dealing as to give the broker implied authority to advance money to pay the person's margins and continue the deal for him.

BROKERS—CUSTOM OF MARKET.—One who employs a broker to operate in stocks for him must be presumed to give him authority to act as other brokers do, and, in the execution of his orders, to follow the rules and usages of the stock exchange, and the principal is bound by the custom of the business, whether he is familiar therewith or not.

BROKERS—CUSTOM—SALE AND PURCHASE BY CORPORATION WITH SAME OFFICERS.—Where a broker, according to a custom of a stock exchange, has a right, on the failure of a customer to pay margins, to close out the deal by selling it on the floor of the exchange, the mere fact that the deal was purchased by another corporation, some of whose officers were officers of the corporation acting as broker, does not avoid the sale in the absence of any showing that the purchaser suffered some prejudice or injury by such relation.

Wilson & Van Derlip, for the appellant.

John F. Fitzpatrick, for the respondent.

300 CANTY, J. The plaintiff corporation is a member of the chamber of commerce of Minneapolis. On January 11, 1897, plaintiff received from defendant the following letter:

"You will please purchase for me 5,000 bushels No. 1 May wheat at 78 cents, and advise.

"Yours truly,

"N. JUNGEBLUT."

301 Plaintiff executed the order the next day on the open board of the chamber, notified defendant at his place of business in St. Paul to that effect, and requested him to send check for two hundred and fifty dollars. He sent the check the same day, January 12th, stating: "Enclosed \$250, option on 5,000 bushels May wheat."

On January 28th defendant wrote plaintiff as follows: "I note from to-day's market report that my margins on the purchase of 5,000 bushels May wheat are exhausted, and herewith enclose check for \$150 additional margins."

May wheat continued to fall until April 7th, when it had fallen to sixty-four and three-eighths cents, and plaintiff called on defendant for four hundred dollars more margins, which he refused to put up, and on the next day plaintiff closed out the deal for the five thousand bushels at sixty-five and one-eighth cents per bushel, leaving a loss or deficiency below the amount of margins so put up by him of two hundred and forty-three dollars and seventy-five cents and six dollars and twenty-five cents commissions, or a total of two hundred and fifty dollars. This action is brought to recover this amount.

Defendant did not plead that it was a gambling transaction, and, as he did not set up any such illegality in his answer, was not able to make the defense on the trial: Dodge v. McMahan, 61 Minn. 175.

At the close of the trial each party moved that the court direct a verdict in his favor. The judge granted the motion of plaintiff and ordered a verdict for it for two hundred and fifty dollars. Defendant thereafter moved for judgment notwithstanding the verdict or for a new trial. The court ordered judgment that plaintiff take nothing, and that defendant recover his costs and disbursements. From this order plaintiff appeals.

1. It is contended by respondent that he never requested or authorized plaintiff to pay out the money for him, and that it

should have closed out the transaction as soon as the margins put up by him had run out. The monthly statement sent him by plaintiff January 30th contains the following notice: "On all marginal business the right is reserved to close transactions when margins are running out, without giving further notice, and to settle contracts in accordance with the rules and customs of the Minneapolis Chamber of Commerce."

³⁰² Similar notices were sent in the monthly statements of March and April. It appears by the evidence that, according to such rules and customs, this closing out was done by going upon the open board of the chamber, and selling to the highest bidder the interest of the purchaser (or seller, as the case might be) in the particular deal.

Respondent claims that under the above notice plaintiff was bound to act on this rule and close out the deal when his margins were exhausted. We cannot so hold. The notice merely reserved to plaintiff the right to close it out. We are of the opinion that by the course of dealing between the parties it conclusively appears that plaintiff had implied authority to advance money for defendant in order to keep up and continue the transaction on his part until the time came to settle it in the month of May, unless orders to the contrary were given in the meantime.

No money accompanied his order sent January 11th to purchase the wheat. Plaintiff made the purchase, informed him of that fact, and requested him to send his check, which he did. When he found, on January 28th, by the market report that his margins had been exhausted, he did not inquire of plaintiff whether it had closed out or sold out the deal, but assumed that plaintiff had not, and sent it an additional one hundred and fifty dollars. As we shall hereinafter show, it must be presumed that defendant knew the course of dealing on the chamber of commerce.

It was conceded by defendant on the argument that plaintiff was personally responsible for all loss on this deal to the full extent of the fall in the market, and that, if it did not have on hand a sufficient deposit of defendant's money to cover the loss, it would have to pay the balance of such loss out of its own funds. It is plain that when defendant sent in the order on January 11th he expected plaintiff to make the deal, and thereby incur liability for loss, without first receiving any deposit at all from him, and it did so make it.

Again, after he had put up such a deposit, if, after his margin ran low, the market fell suddenly to a point where the loss would exceed the amount of the deposit, plaintiff might not have an opportunity to go upon the open board of the chamber and sell out the deal after the amount of such deposit was exhausted and before ³⁰³ the market dropped below the point at which the deposit was exhausted, and thereby prevent loss to itself. Defendant knew all of this. On January 28th he promptly and voluntarily put up additional margins without being asked for them, when he found by the market reports that his margins were exhausted, and yet until April 7th, when plaintiff demanded still more margin after the loss here in question had occurred, he failed to notify plaintiff that he would not pay anything more for carrying the deal.

2. Respondent contends that he employed plaintiff to act as his agent in purchasing wheat for him from some third party, and to carry and continue the contract in that form; that it appears by the evidence that a wholly different contract was made, whereby plaintiff was to become, and did become, the opposite party to a contract with him to sell him wheat for future delivery; that, while plaintiff was acting as his agent to buy, it attempted to become the opposite party to the contract and sell to him wheat through itself as such agent. The contract made was of this peculiar kind, and respondent contends that it was so made without his knowledge or consent. We cannot so hold.

The chamber of commerce is a corporation. Its members meet daily in a certain room at a certain hour, and buy and sell large quantities of grain for both present and future delivery. No one but members are allowed these privileges. While in the great bulk of the transactions the members act as brokers or agents for others, the rules require them to buy and sell in their own names, without disclosing their principals; and this is the uniform custom. The contracts of purchase and sale are oral, and each member makes at the time a memorandum of the transaction on a card, and retains it for his own convenience. At the close of each day's transactions it is usually found that each member has bought from and sold to various other members for future delivery, and a universal system of setoff is then resorted to.

There is another corporation, known as the Clearing Association, which acts as a universal go-between, or clearing-house, for these transactions. At the close of each day's business all of these transactions are reported to the Clearing Association,

which then becomes the opposite party to the transactions of each member for ³⁰⁴ the purpose of offsetting the same. When the member is the buyer, the Clearing Association becomes the seller, and when the member is the seller, the Clearing Association becomes the buyer. Then all of the transactions between that member and the clearing-house are offset, and the balance carried in the account between them until the next day, when a new balance is struck.

But balancing new transactions is but a part of the business of the clearing-house in regard to sales for future delivery. As the price goes up or down each day, the clearing-house pays to the member or receives from him the difference in price on that day's balance; if, on balancing all transactions with him it appears that he has bought more than he has sold, he is buyer as to such balance and the clearing-house is seller, and vice versa. If he is buyer as to such balance, and wheat fell in price that day, he must pay to the clearing-house the difference between the price on that day and the price on the day before, and vice versa.

It will thus be seen that each member acts as a clearing-house within himself as to all his customers, and that he offsets the transactions of his customers against each other, and only resorts to the Clearing Association for any balance of buyers over sellers or sellers over buyers among his own customers. Except as hereinafter stated, it does not appear by the evidence whether or not defendant knew that this was the customary way of doing business in the chamber of commerce.

When the order of January 11th was received from defendant by plaintiff, it went upon the open board and purchased the wheat from A. G. Chambers & Co., another member of the chamber. This transaction passed through the clearing-house and was offset and carried along from day to day in the manner above described. Then it is clear that there was no opposite party to this transaction except plaintiff's own broker, this plaintiff, and that the latter, Chambers & Co., and the Clearing Association never intended that there should be any other. But was not this also defendant's intention? He contends not. He had been dealing in options for nearly two years, and had at least three prior deals in which plaintiff acted as his broker. In his letter of January 12th he spoke of the transaction as an "option." On January 28th he wrote that he ³⁰⁵ learned from the market report that his "margins" were exhausted. When plaintiff telegraphed him on April 7th for

four hundred dollars more for margins, he answered: "Your telegram of this morning is a surprise. I have been under the impression that, according to the general rules, you had closed my option when the margins were exhausted, as no notice to the contrary was received, and no demand for margins made, although the May price has been below seventy cents for some time; and I must decline to remit additional margins."

This would indicate that he was quite familiar with "margins" and "options," and that this class of transactions was governed by rules peculiar to the business. But whether he was thoroughly familiar with the way of conducting this business and the rules pertaining to the same is not material. He is bound by the custom of the business, whether he is familiar with those customs or not. "It may be laid down as a general proposition that one who employs a broker to operate in stocks for him must be presumed to give him authority to act as other brokers do, and, in the execution of his orders, to follow the rules and usages of the stock exchange. And in the application of this rule it has been held that it is immaterial whether the principal is familiar with such rules and usages or not": 23 Am. & Eng. Ency. of Law, 733, and the many cases cited. "The usages of a particular place or of a particular business are impliedly incorporated into every contract of agency, unless the contrary is specially mentioned. The principal and agent are presumed to adopt such usages, and to agree to govern themselves in accordance with them. It is the duty of the principal to inform himself of such usages, and he cannot be allowed to say that he was ignorant of them": 27 Am. & Eng. Ency. of Law, 885, 886, and cases cited.

Respondent contends that he was not bound by the usages and customs of the chamber of commerce, and relies on *Irwin v. Williar*, 110 U. S. 499. In that case there was no clearing association, and in that respect the case differs from the one at bar. The effect of this difference we will discuss later.

The court, in *Irwin v. Williar*, 110 U. S. 499, relied on *Robinson v. Mollett*, L. R. 7 H. L. 802, which is still a different case. The tallow brokers³⁰⁶ of London had a custom whereby they would meet once a month on certain settling days and each two brokers would balance between themselves the purchases and sales made by the one to or from the other. These brokers were not members of any general organization or corporation, and, so far as appears, were at liberty to buy from or sell to any person who called himself a broker, and

perhaps to or from others who did not. The broker dealing with any of these parties was personally responsible for the acts of the party with whom he dealt, and might at any time suffer a loss by the failure of the latter. In *Robinson v. Mollett*, L. R. 7 H. L. 802, that very thing occurred by the failure of *Simpson & Co.* In such a case the broker representing a principal was not a mere disinterested stakeholder, but a party adverse to the interest of his principal, and might at any time be called upon to make good to such principal a loss occurring by reason of the failure of the other broker or party with whom the deal was made.

In the opinion in *Irwin v. Williar*, 110 U. S. 499, the court cited *Robinson v. Mollett*, L. R. 7 H. L. 802, to the effect that the principal is not bound by the custom of which he has no knowledge, where such custom, if allowed to prevail, would work a change in the relation between the broker and his principal by permitting the agent to buy to convert himself into a principal to sell. In the former case the following extract is quoted from the opinion of Mr. Baron Cleasby in the latter case: "Its vice [the vice of the custom or usage] consists, I apprehend, in this: That the broker is to make the contract of purchase for another whose interest as buyer it is to have the advantage of every turn of the market; but, if the broker may eventually have to provide the goods as principal, then it becomes his interest, as seller, that the price which he is to receive should have been as much in favor of the seller as the state of the market would admit. Thus, the two positions are opposed."

The facts were similar in the case of *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631, and this court arrived at substantially the same result as was arrived at in *Robinson v. Mollett*, L. R. 7 H. L. 802.

In the case at bar the Clearing Association took from plaintiff the risk of the failure of the opposite broker, and also the risk of ³⁰⁷ being buyer for more than it was seller, or seller for more than it was buyer. Then plaintiff became a mere stakeholder for its own customers, so far as the sales and purchases of those customers balanced each other, and took no risk except as to the failure of its own customers to pay the amounts due from them, and against this risk plaintiff had a right to demand indemnity in advance. It would seem from the evidence that the Clearing Association took all other risks, and it is not suggested that the association was not amply

responsible. Again, the risks taken by the Clearing Association were merely as to the responsibility of a previously ascertained and presumably well-known circle of brokers, limited in number. Then, if plaintiff ran its business strictly according to the rules and regulations, and compelled its customers to indemnify it in advance, it was not interested adversely to any of its customers. There is no evidence that plaintiff failed to live up to these rules except as it failed to require or compel this plaintiff to indemnify it in advance.

The burden was on defendant to plead and prove that the transaction in question was illegal or against public policy, and he has failed to maintain that burden. Then, we are of the opinion that defendant was bound by the custom, whether he knew it or not.

3. Plaintiff foreclosed defendant's rights in his deal by selling it out on April 8th to another corporation, some of whose officers are also officers of plaintiff. The two corporations were separate entities, and the mere fact that some of the officers of one are officers of the other is not sufficient alone to avoid the sale. Defendant must show that some prejudice or injury resulted to him from the fact that the two corporations were thus related: 3 Thompson on Corporations, sec. 4079.

This disposes of the case. The order appealed from is reversed and judgment is ordered for plaintiff on the verdict.

Rights and Remedies of Brokers and Their Clients when Purchases are on Margins.*

The legality of contracts between brokers and their clients when purchases are on margins has been discussed in the monographic note to *Crawford v. Spencer*, 1 Am. St. Rep. 752. In this note we shall assume the legality of such agreements and ascertain what rights the parties have under them. The ordinary rights growing out of the general relation of brokers and their clients will be treated but incidentally, the main inquiry being what rights and remedies accrue to the parties by reason of the fact that the purchase or sale has been on a margin. The history of the legal relation of broker and client and the general rights growing out of such relation are fully treated in the extended note to *Horton v. Morgan*, 75 Am. Dec. 311.

Definition.—A purchase on a margin is one in which a sum of money or its equivalent, called a margin, is placed in the hands of a broker by the purchaser as a security to the broker against any loss

***REFERENCE TO MONOGRAPHIC NOTES.**

Contracts for sale of personal property to be delivered in future: 1 Am. St. Rep. 752-766.

Duty of stock broker to his client: 75 Am. Dec. 313-326.

to which he may be exposed by reason of a subsequent depression in the market value of the stock. A sale on a margin occurs when a seller orders a broker to sell stock or other commodity for him; the seller not having stock to deliver, the broker must borrow the same from other parties and deliver to the purchaser; the margin in such a case is the sum of money deposited with the broker to protect him from any loss he might be subject to by reason of a subsequent rise in the market value of the stock. In the case of a purchase on margin, the broker keeps both the margin and the purchased stock as security against loss to himself. In a sale on margin, the broker keeps the margin only as security against loss: See 14 Am. & Eng. Ency. of Law, 314; 2 Cook on Corporations, sec. 457.

Relation of Pledgor and Pledgee.—The relation that exists in such transactions between a customer and his broker is the relation of pledgor and pledgee. The customer is the pledgor, the broker is the pledgee, and the stock is the article pledged. The question has been raised that in speculative transactions of this character where there is no actual possession by the purchaser and perhaps no consummated sale, the relation of pledgor and pledgee could not be created. But to this the court in *Markham v. Jaudon*, 41 N. Y. 235, replied: "While it is true that the dealer, in the present case, never had actual possession of the property, which he claims to have pledged, he had it sufficiently to bring his case within the principles of the law of pledge. The substance of the first branch of the transaction is this: The plaintiff calls upon the defendants, who are brokers, to purchase for him certain shares of railroad stock, and furnishes him with one thousand dollars for that purpose, agreeing to pay interest on advances he shall make in the purchase, and commissions. The defendants make the purchase, having themselves advanced ninety per cent of the purchase money. They bring to the plaintiff the certificates of the stock thus purchased by him and for him, and deliver them to him as the owner thereof. He thereupon hands them back to the defendants, to hold as security for their advance on the purchase, with interest and commissions. If these precise forms had been observed, no one would deny that the redelivery of the certificates would have constituted a strict, formal pledge. In my opinion, the transaction, as it took place, amounted to the same thing. To have delivered the certificates to the plaintiff, and that the plaintiff should then have returned them to the defendants, to be held by them as security for the advance in their purchase, would leave the parties in precisely the same situation as if the defendants had retained them for that purpose; the form of a delivery to the plaintiff, and a redelivery by him to the defendants, being waived by agreement of the parties. . . . The securities are appropriated as security for an engagement, to wit, the payment of the advance, with interest and commissions. The possession and delivery are complete, in the abbreviated manner I have described. The right of redemption, in other words, the ultimate ownership of

the property in the plaintiff, was clearly provided for, and was the prominent idea in his mind. There is no evidence here that the plaintiff necessarily intended a sale of the stock purchased. He bought it for the purpose of making money. If he could make more money by holding it permanently than by selling, no doubt he would continue to hold. But I do not find that the intention to have or to suffer a sale, or the reverse, forms an element in the definition of a pledge. Nor do I see how the fluctuating value of the property can be invoked to determine the character of the transaction." There is no doubt as to the transaction being a pledge: See, in addition, *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Skiff v. Stoddard*, 63 Conn. 198. In this last case the question is discussed at some length. The ordinary rights of a pledgor and pledgee of stock are the same as those of any pledgor and pledgee, and need no special treatment in this note outside of the rights of such parties when the purchase is on margin.

Broker's Right to Repledge Stock.—The general rule that a pledgee cannot repledge the article pledged is true of this class of transactions. "Equity will not tolerate a separation of the pledge from the debt, and they must stand together, and will force on the wrongdoer the character of a trustee, and thus compel him to do justice": *Bennett v. Austin*, 81 N. Y. 309. See *Work v. Bennett*, 70 Pa. St. 484; *Merchants' Nat. Bank v. Trenholm*, 12 Helsk. 520; *Skiff v. Stoddard*, 63 Conn. 198. In this last case the court said that "the right to repledge for his own debt is clearly one not enjoyed by a common-law pledgee." And while this is the rule, its practical effect is very largely obviated by the character of the property which is the subject of the pledge, and by the custom of dealing in particular markets. Shares of stock have no earmarks, and all that is required of a broker is that he shall have shares of stock in sufficient number to deliver to his purchaser if they should be called for, so that there would seem to be no reason why a particular share should not be repledged for the broker's own debt if he retains sufficient shares to answer all possible demands. Courts have at times evaded passing on the right to repledge because of the character of the property, as in *Chew v. Louchheim*, 80 Fed. Rep. 500. In this case there was an express contract which prevented the broker from transferring the stock, and in reference to a repledge of it the court said: "We are not called upon to consider whether this disposition of the property would have been justifiable in the absence of a stipulation that they should not part with it; with the stipulation it was clearly wrong. The relation of the parties was that of bailor and bailee. The property was the plaintiff's, and the obligations of the defendants were the same as they would have been if he had delivered it to them to hold for the balance of the purchase money. The defendant's transfer of it, whether for the payment of their debts, by the assignment, or previously to secure money borrowed, was a fraudulent conversion, which instantly terminated the contract of bailment, and vested the

right of possession in the plaintiff." The essential difference between shares of stock and other property pledged was clearly stated in *Skiff v. Stoddard*, 63 Conn. 198: "Shares of stock have no individuality, no earmarks. One share does not differ from another share of like stock in form, characteristic, or value. Each share represents simply an undivided proportionate interest in the ownership of the corporation. It entitles its owner to a certain right in the management, profits, and ultimate assets of the corporation, precisely like that which every other shareowner enjoys. Certificates of stock which have earmarks are not the stocks. They are only the evidence of the ownership of the stocks. They are muniments of title like title deeds. They have no value save as evidence of the thing owned, which has nothing individual, distinguishable, or peculiar about it. Courts have, therefore, said that no good reason existed for requiring that a pledgee of stocks should at all times preserve a careful separation of distinguishable certificates connected with each transaction of pledge, and maintain the identity of each certificate distinct and unbroken. They have said that the essential thing was that he hold at all times the required shares of stock ready to be delivered when called for, and, in recognition of this fact and of the right enjoyed by the pledgee to transfer the stocks held by him in pledge into his own name, they have held that a pledgee fully preserves the rights of the pledgor if he at all times until the termination of the pledge retains similar stock in amount equal to that pledged. This has been held of pledges in their ordinary form as well as of those incidental to margin transactions: *Nourse v. Prime*, 4 Johns. Ch. 490, 8 Am. Dec. 606; *Horton v. Morgan*, 19 N. Y. 170, 75 Am. Dec. 311; *Gilpin v. Howell*, 5 Pa. St. 41, 45 Am. Dec. 720; *Price v. Gover*, 40 Md. 102; *Hubbell v. Drexel*, 11 Fed. Rep. 115." There would seem to be no good reason why a broker should not repledge shares of stock even in the absence of an agreement or of a custom to that effect, providing he has at all times under his control sufficient shares to meet the demands of his customers. This would sufficiently protect the purchaser. The cases do not, however, go to this extent.

Where the contract between the broker and his purchaser is entered into with knowledge of a custom to repledge stock, this may be done, at least within certain limits: *Chamberlain v. Greenleaf*, 4 Abb. N. C. 178. In such a case the custom enters into and forms a part of the contract itself. In *Skiff v. Stoddard*, 63 Conn. 198, where the purchasers knew their orders for stocks were to be executed in the New York Stock Exchange and the stocks purchased were repledged by the brokers, it was said that "they must therefore be held to have contemplated and authorized a course of dealing in accordance with the rules and customs of that market. The authorities are not uniform as to the effect of trade usages upon the contractual obligations of parties. We think, however, that the better authority goes to this extent, at least, that when one employs another to deal in a particular market he will be held as intending that the mode of

performance should be in accordance with the established customs and usages of that market, as long as the custom or usage is neither immoral, unlawful, unreasonable, contrary to the express agreement of the parties, nor such as to change the intrinsic character of the undertaking. In view of the character and necessities of the business undertaken by brokers in carrying for their customers stocks bought upon a margin, and of the purposes which the custom of repledging was intended to serve, we are not prepared to say that it is open to any of the enumerated objections. Courts have commonly sanctioned it": See *Oregon etc. Co. v. Hilmers*, 20 Fed. Rep. 717; *Nourse v. Prime*, 4 Johns. Ch. 490, 8 Am. Dec. 606.

The growing tendency seems to be to give a wider scope to the customs of a particular market, and to hold a customer bound by stockbrokers' customs even though such customs were unknown to him. This is indicated by the principal case, and as applied to the repledging of stock is seen in the concurring opinion of Patterson, J., in *Douglas v. Carpenter*, 17 App. Div. (N. Y.) 329, where the judge goes further than the remainder of the court on this point. He says: "The broker may use in his own business shares purchased on margin and held by him for advances, and he is bound only to be ready on demand to give his customer his shares or an equal number. He cannot, of course, purchase after a demand and speculate on his customer's speculation, but he must always be in readiness with shares actually available in the course of business for delivery from the date of the execution of his customer's order. That does not curtail his right to use the shares in his business and until demand is made. What is meant by the phrase 'having always in his possession'? I do not understand it to be that he must have a certificate of shares in actual and continuous physical possession, but that he must have shares always under his control, so that when, in due course of business, he is called upon, he can deliver without going into the market to buy. He does not convert the stock of his customer simply by using it in the ordinary way in which brokers conduct their business by borrowing money to carry all their customers' stocks, pledging and repledging even in bulk from time to time according to the custom of their business and as the necessities of their transactions may require, and to enable them to hold the shares, so long as they have shares under their control and available to perform their specific contracts with their customers when called upon to do so." Though the custom of brokers does seem to sanction large powers in the matter of pledging the stock of their customers, the courts have been conservative, and, for the purpose of protecting the customers, permit such pledging only within certain well-defined limits. In the same case from which we have just quoted, the main opinion in the case recognizes the right to repledge, but only for an amount not exceeding the indebtedness due from the customer to the broker. In such a case the customer is protected, for he could have gone to the pledgees and have obtained his securities by payment or tender of the amount of his indebtedness. "But mingling them with other

securities," said the court, "and pledging them for an amount larger than the defendant's (customer's) indebtedness would have placed them where the defendant could not have obtained them by a payment or tender of the amount of his indebtedness." Conceding the right to pledge for an amount equal to the broker's lien, that right ceases "the instant the lien is discharged by the tender or payment of the debt, or the performance of the covenant or engagement for which the security is given": *Lawrence v. Maxwell*, 53 N. Y. 19; *Van Voorhis v. Rea*, 153 Pa. St. 19. And as soon as the lien of the broker is discharged, he must return the stock to the purchaser: *Lawrence v. Maxwell*, 58 Barb. 511. If the broker can pledge the stock in such a way that it could be returned to him on payment of the sum loaned, the broker would not be liable, providing custom or an agreement of the parties sanctions a pledge at all. "Such a use of the stock might not be inconsistent with the intention of the parties, and would not subvert the ultimate right of the pledgor": *German Sav. Bank v. Renshaw*, 78 Md. 475. If sanctioned by the agreement of the parties or by the customs of the stock exchange, a broker may repledge the stock of his purchaser, providing such a pledge will not prejudice the interests of the purchaser. Some of the earlier cases seem not to have recognized the right to pledge stock, though it is the custom of stock brokers to do so, no distinction being recognized between stock and any other article of personal property that might be pledged: See *Dykers v. Allen*, 7 Hill, 497, 42 Am. Dec. 87.

Broker's Rights and Duties on Failure of Margin.—Most of the difficulties between brokers and their purchasers have arisen when the margin deposited by the purchaser has become exhausted, and the necessity arises for immediate action in order to prevent loss to one or both of the parties. The question as to what a broker shall do when the margin deposited with him is exhausted by reason of a fall in the market value of stocks may have been settled by the contract itself or by some specific orders of the purchaser. In such a case the broker has nothing to do but to follow his instructions, which, if he does faithfully, will protect him, but otherwise he will be liable for any resulting loss. This point, however, seems to have been but recently settled. Some doubt seems to have existed as to the duty of a broker to sell when so instructed by a purchaser upon the failure of margin, since the relation between them was that of pledgor and pledgee. The case of *Zimmermann v. Hell*, 86 Hun, 114, affirmed in 156 N. Y. 703, satisfactorily determines what are the rights and duties of the parties under such circumstances. In this case the purchaser's margin was exhausted; he could deposit no more, and instructed the broker to sell, which he failed to do until more than a month later. The court, in holding that the purchaser was not liable for the intervening loss, and that the broker should have sold when so instructed by his purchaser, said: "While the legal relation between broker and client is that of pledgor and pledgee, there exists likewise that other legal relation of principal

and agent. And we fail to see why an agent, in the case of a purchase and sale of stocks, is not in the same position with respect to his principal as any other agent would be. True, he has an agency coupled with an interest; but this relation of agency when once created is not affected by the question whether the principal has or has not kept good his margin. Until the transaction is finally closed out and a profit or loss results, the relationship between the parties is undisturbed. If we are correct in this view, it would be an anomalous conclusion to hold that an agent, for his own supposed benefit or profit, could violate the instructions of his principal, and if a gain resulted, have the benefit of it, and if a loss, charge it upon his principal. Even though a broker engaged in the sale of stocks has an interest as agent in the transaction or in the property which he holds for his principal, there is no hardship in his being obliged at all times to comply with the client's instructions. It is entirely within the broker's right at all times to protect himself by requiring sufficient margin, which, if not forthcoming, entitles him to sell, and thus avoid a loss. If, on the other hand, he is careless and unbusinesslike, and permits the margin to become exhausted and a loss results, he cannot take the risk of making this good by holding the property of his principal after he is instructed to sell the same, and for any additional future loss occurring after such instructions are given, hold his customer. Any other rule would permit an agent to speculate upon the account and at the risk of his principal. We think, therefore, that the customer has the right to direct the broker to sell his stock at any time, and unless he does so within a reasonable time thereafter, he is responsible for any loss that may result from his failure to obey his customer's instructions." To the same effect, see *Allen v. McConihe*, 124 N. Y. 342; *Hollingshead v. Green*, 1 Cin. Rep. 305; *Lazare v. Allen*, 20 App. Div. (N. Y.) 616. As to what is a reasonable time within which to sell may vary with the circumstances. In *Johnston v. Miller* (Ark.), 53 S. W. Rep. 1052, it was held that a sale on Monday morning was within a reasonable time where the purchaser had instructed the broker on the Sunday, the previous day, after having received three telegrams from the broker on the three preceding days that the market was falling and demanding additional margins. What is a reasonable time within which to sell is a question of law: *Davis v. Gwynne*, 57 N. Y. 676.

Where the margin in the broker's hands is not yet exhausted, a broker clearly has no right to sell the stock without instructions from the purchaser; *Denton v. Jackson*, 106 Ill. 433. In *Kanady v. Burk*, 18 Mich. 278, where the margin was exhausted, the brokers agreed not to sell until a certain time, yet they sold before that time, and it was held that the purchaser must tender performance at the specified time in order to put the brokers in default. It would seem, however, that if the broker is a mere agent of the purchaser, a promise not to sell until a certain time amounts to a di-

rection from the principal to the same effect, which the broker (the agent) is obliged to follow, and if he fails to do so and sells before the time has expired, he is liable to his principal (the purchaser) for whatever damage he has suffered. This was so held in *Morgan v. Jaudon*, 40 How. Pr. 366. See, also, *Rogers v. Wiley*, 131 N. Y. 527. The purchaser may instruct his broker to act in his best judgment in regard to a deal made on his account, and, if the broker does so act and loss results, he is not liable: *Cameron v. Durkheim*, 55 N. Y. 425.

A broker, being the agent of his purchaser, has no right to sell the stock he has purchased for his principal without a demand for additional margins and notice that in default of sufficient margin being deposited he will be obliged to protect himself by a sale. In every contract to buy or sell on margin there is an implied agreement that if the purchaser or seller should fail to maintain his margin, the broker may sell for his reimbursement to protect himself from loss, providing he makes a demand for additional margin and gives notice that if it is not furnished he will sell the securities: *Schepeler v. Eisner*, 3 Daly, 11. In *Minor v. Beveridge*, 67 Hun, 1, the court said: "Where there is a contract to carry stocks upon a margin, an agreement, as part of the contract, is implied that such stocks shall not be sold in case there is danger of the exhaustion of the margin until additional margins shall be applied for and a reasonable time afforded for the furnishing of the same. . . . The sale of stock without notice is a breach upon the part of the broker of the contract under which the stocks were purchased." Brokers are not required to carry stocks indefinitely. "Whenever," said the court in *Stenton v. Jerome*, 54 N. Y. 480, "they desire to close the transaction in reference to any stocks, it was their duty to tender the certificates thereof to the plaintiff [purchaser] and demand payment for them; then, if within a reasonable time she did not take and pay for the stocks, they had a right to sell them to satisfy their lien, after first giving her notice of the time and place of sale. There was only one contingency in which they could under the agreement sell the stock without notice, and that was, if the plaintiff's margin fell below twenty per cent and she failed, upon demand, to make the margin good, then, by the express stipulation of the agreement, they could sell without notice. Here there was no demand for margin, and hence there was no right to sell on account of the insufficiency of the margin." Both demand for additional margin, and, upon failure to furnish it, notice that a sale will be made, are requisite in order that a broker may make a valid sale of stock purchased on margin: *Gruman v. Smith*, 81 N. Y. 25. Regarding the necessity of notice of sale, it was said in *Ritter v. Cushman*, 35 How. Pr. 284: "Doubtless, parties may agree that the broker may sell without notice, when stocks fall in price so that the margin does not cover the difference between current rates and the price paid. But, in the absence of any such agreement, it would be

a breach of good faith and common honesty to allow the plaintiff's property to be sacrificed, without giving him an opportunity to increase his margin, and hold the stock for a favorable change in the market. I know it is said that fluctuations in the stock market are so sudden and unexpected that there is not time to give notice; but these abrupt transitions in the value of stocks are and have been well known for many years, and should be provided for by brokers and those with whom they deal. If no such provision is made, parties must abide by the rules of law." In *Foote v. Smith*, 136 Mass. 92, the necessity for making a demand for more margins was sought to be done away with by the fact that the purchaser, who had agreed that if his margin was exhausted the broker should draw on him, had gone out of the state and had made no provision for the payment of a draft. But the court held that the brokers had no right to sell until the purchaser was put in default, and under the terms of the contract the only way in which he could be placed in default was by a failure to pay the draft when drawn upon by his brokers. The common law is strict in its requirement that a demand for additional margin shall be made and notice of sale shall be given: See, further, *Perin v. Parker*, 17 Ill. App. 169; *Denton v. Jackson*, 106 Ill. 433.

As already intimated, the parties may by agreement dispense with the necessity for notice to be given to the purchaser before a broker can sell: *Cameron v. Durkheim*, 55 N. Y. 425; *Wicks v. Hatch*, 62 N. Y. 535. But where a purchaser agrees to furnish additional margin on demand, in default of furnishing which the brokers could sell without notice, it was held that no authority was conferred on the brokers to sell without first making demand for more margin: *Stenton v. Jerome*, 54 N. Y. 480. As to whether there can be a sale without notice if the custom of the stock exchange sanctions such a proceeding, there is some conflict of authority. In *Markham v. Jaudon*, 41 N. Y. 235, such a custom was held to be of no effect. "The broker had no right to sell without such a notice," said the court. "A practice or custom to do otherwise would have no more force than a custom to protest notes on the first day of grace, or a custom of brokers not to purchase the shares at all, in a case like the present, but to content themselves with a memorandum or entry in their books of the contract made with their customer. Such practice in each case would be in hostility to the terms of the contract, an attempt to change its obligation, and would be void." To the same effect, see *Taylor v. Ketchum*, 35 How. Pr. 289. But in *Appleman v. Fisher*, 34 Md. 540, the contract was deemed to have been made with an implied understanding that the customs of the stock exchange should be a part of it, although the particular custom to sell without notice was unknown to the customer. The tendency certainly is to allow the custom of a stock exchange to enter into and form a part of the original contract itself, especially where the purchase or sale is to be conducted in a particular exchange or board of trade which is known to have regular rules and

customs governing its transactions: See *Corbett v. Underwood*, 83 Ill. 324, 25 Am. Rep. 392; *Denton v. Jackson*, 106 Ill. 433; and the principal case. The question is very largely settled now by the fact that the written authority which brokers exact from their purchasers gives them the power to make a sale of the stocks purchased without the necessity of notice. In the absence of an agreement, it is the just and reasonable rule that a demand should be made upon the purchaser to furnish additional margin when that which he has deposited has been exhausted, and that if such demand is not complied with, the broker may sell without further notice to the purchaser. A custom of a stock exchange which went no further than this would be reasonable and should be upheld. But a custom which dispenses with all demand for additional margin, and which furnishes no opportunity to the purchaser to save his investment if he desires, would seem to be unreasonable as unjustly depriving the purchaser of his property and should not be sustained. It seems that where the transaction does not amount to a pledge of the stock that the rule requiring notice to be given does not operate, the brokers having the right to sell or to buy when they see fit to protect themselves: *Sterling v. Jaudon*, 48 Barb. 459. Compare *Corbett v. Underwood*, 83 Ill. 324, 25 Am. Rep. 392. What is a reasonable notice to a purchaser to furnish additional margin depends upon the circumstances of each case. Two days' notice is undoubtedly more than sufficient: *Stewart v. Drake*, 46 N. Y. 449. One hour's notice is wholly inadequate: *Lazare v. Allen*, 20 App. Div. (N. Y.) 616. A purchaser may, however, waive his right to object to a notice as not being sufficient: *Gillett v. Whiting*, 141 N. Y. 71, 38 Am. St. Rep. 762. A broker may likewise waive his right both to demand more margins and to close the account and sell the stock in the absence of additional margins: *Rogers v. Wiley*, 131 N. Y. 527. The rule that a broker cannot sell without instructions from his principal unless his margin is exhausted and demand for more has been made applies also to a purchase of stock to cover a sale which has been made for his principal. "He is the agent of his customer, and must obey his orders both in making the sale and in covering it": *White v. Smith*, 54 N. Y. 522. If the principal refuses to deposit additional margin where he has ordered the broker to sell stock for him, the broker may buy immediately to protect himself. But where the principal does not refuse absolutely to furnish sufficient margin, but his refusal is conditional, the broker is not obliged to buy immediately to cover the sale, and is not required to buy until it is necessary for him to deliver the property already sold: *Perin v. Parker*, 126 Ill. 201, 9 Am. St. Rep. 571.

Purchaser's Remedies against His Broker.—We have already noticed that an unauthorized sale of stocks held by a broker as pledgee of his purchaser is a conversion, and in such a case the purchaser may maintain an action of trover to recover the value of the stocks: *Chew v. Louchheim*, 80 Fed. Rep. 500; *Baker v. Drake*, 66 N.

Y. 518, 23 Am. Rep. 80; *Markham v. Jandon*, 41 N. Y. 235. The same is true where the broker unlawfully pledges the stock for his own debt. We have seen that there may be cases in which a broker can repledge stocks purchased for his principal, and where such a right exists the exercise of it cannot amount to a conversion. In the absence of such a right, a repledge of the goods would amount to a conversion, for which trover will lie: *Merchants' Nat. Bank v. Trenholm*, 12 Helsk. 520. While the sale of stocks may be a conversion, the sale of the particular stocks purchased will not be a conversion if the broker has at all times in his possession, or under his control, securities of the same kind and of like amount as those sold: *Douglas v. Carpenter*, 17 App. Div. (N. Y.) 329. Shares of stock, as has been said, have no earmarks, and it is wholly immaterial, so far as the purchaser is concerned, whether he obtains the stock which was actually purchased for him, or whether it is stock of the same identical kind: See, also, *Caswell v. Putnam*, 120 N. Y. 153. A purchaser may by his actions waive his right to recover for a conversion of the stock: *Stewart v. Drake*, 46 N. Y. 449. It is unnecessary for us to discuss here the proper rule of damages in case of a conversion of stock where the purchase is on margin, whether the purchaser can recover the highest intermediate value of such stock, or whether he is confined to the value at the time of the loss. The latter rule would seem to be the most just and reasonable, especially considering the nature and purpose of the transaction. The former rule is held, however, in New York and some other jurisdictions: *Merchants' Nat. Bank v. Trenholm*, 12 Helsk. 520; *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80. The dissenting opinions in this last case show clearly the nature and effect of the New York rule.

Where a broker sells his purchaser's stock in violation of his agreement, the purchaser can either ratify and claim the benefit of the sale, or claim the value of the shares on the day of sale: *Tausig v. Hart*, 58 N. Y. 425; *Strong v. National etc. Assn.*, 45 N. Y. 718. In the first case the brokers subsequently to the unlawful sale had acquired similar stock at a greatly reduced figure, which they had bought to replace the shares sold, and they contended that, having the stock to furnish the purchaser, they were not liable to him to any further extent. To this the court replied that "the subsequent acquisition by the plaintiffs, after the stock had fallen to a very low figure, of a sufficient number of shares to replace those which they had held for account of the defendant, did not relieve them from liability. Such reacquired stock was never accepted by the defendant, and he was in fact ignorant of the transactions. To allow a broker to sell his customer's stock without authority, and speculate upon replacing it at a lower price, would be encouraging speculations by agents, at the risk of their principals, totally inadmissible under familiar rules. Should the stock rise largely in price after the broker had thus divested himself of all control over the

shares which he had purchased on the order of his principal, the broker might be unable to replace the shares, and the principal would have no remedy except a personal claim against the broker. This clearly is not what is contemplated under an agreement to buy and carry stocks. The customer does not rely upon an engagement of the broker to procure and furnish the shares when required, but upon his actually purchasing and holding the number of shares ordered, subject only to the payment of the purchase price." *Ingraham v. Taylor*, 58 Conn. 503, 18 Am. St. Rep. 291, is not in conflict with this case, for while in this case no actual purchase was made by the brokers, yet they were ready and able to furnish the stocks at any time and to deliver them on demand at the price of the day of the contract. The ability to furnish the stocks to the purchaser on demand at the price for which they could have been purchased at the date of the contract is all that is required. A purchaser cannot urge inconsistent remedies, though he may have an election to choose one or the other. "He cannot charge the [brokers] with the price or value of the stock, either as purchasers or having converted it, and at the same time claim that the stock is undisposed of, and the account for that reason not closed": *Taussig v. Hart*, 49 N. Y. 301.

A purchaser may recover deposits which he has placed with a broker as a margin for the purchase of stocks, when the broker fails to follow his instructions and commits a breach of his contract. In *Prout v. Chisolm*, 21 App. Div. (N. Y.) 54, such a recovery was sanctioned where the brokers, instead of making actual purchases and sales, reported to the purchaser fictitious transactions which appeared only on their books. The court said the brokers were guilty of fraud, and that the purchaser could recover the margins deposited, whether he had been actually injured or not. In *Denton v. Jackson*, 106 Ill. 433, the brokers sold before the margin deposited by their client had been exhausted, and it was held that the brokers were liable for any loss resulting to their client, and that he could recover from them the money deposited as margins. In *Higgins v. McCrea*, 23 Fed. Rep. 782, the brokers, upon the cancellation of contracts which they had made for their customer, had failed to substitute other contracts in accordance with the rules of the Chicago Board of Trade, which action was taken without the knowledge or consent of their customer, and the court permitted a recovery of the margins which had been deposited. But where the purchaser has failed to keep good his margin, the mere fact that the broker has neglected to comply with some custom of the exchange is not such a breach of the contract as will permit the purchaser to recover the margins he has deposited: *Patterson v. Keys*, 1 Cin. Rep. 94.

Purchaser's Rights on Insolvency of Broker.—The rights of customers on the insolvency of their broker has been a matter of some litigation. The customer is, as we have seen, the owner of the stock, the broker being a mere pledgee, so that when the broker becomes

insolvent the question arises as to who is entitled to the stock which the broker has repledged for his own debt. If the broker has not repledged the stocks, but lacks a sufficient amount to satisfy all the customers who have been purchasers on margin, they will share pro rata in the distribution of the stock. Before they can recover their stocks, however, there must be a discharge of the several pledges by a payment of the indebtedness of each purchaser to the insolvent broker: *Skiff v. Stoddard*, 63 Conn. 198. Debtor and creditor customers stand in the same positions; the creditor customer is not entitled to any priority over the other, since he, the same as the debtor customer, is nothing more than a customer whose stock is held as a pledge by the broker: *Skiff v. Stoddard*, 63 Conn. 198. The mere fact that one purchaser can trace his stock gives him no prior or greater equity to the stocks in the possession of the insolvent broker than that possessed by other purchasers on margin: *Sillcocks v. Gallaudet*, 66 Hun, 522. Where the broker has repledged the stock, having the power to do so, the purchaser's rights are modified to some extent. The subpledgees rightfully hold the stocks as security for debts owed to them by the brokers, and the stocks cannot be taken from them by their general owners until these debts are satisfied. So that these debts must be satisfied out of the property held in pledge, and any surplus is to be divided among the original customers whose property the stock is. And so far as the customers are ordinary purchasers on margin, they will share alike in the distribution: *Skiff v. Stoddard*, 63 Conn. 198; *Sillcocks v. Gallaudet*, 66 Hun, 522. But it frequently happens that a purchaser has deposited, as margin, stocks which he owns, instead of money, and the broker has pledged this in violation of his trust. In such a case the purchaser who owns this stock stands in a different and better position than do purchasers on margin in reference to the stock bought for them and which has been repledged. And when a sale is made to satisfy the debt of the subpledgee, the equity of the purchaser who has deposited his own stock as margin is superior "to that of the owners of the other stocks, and it is his right to have an application of their proceeds to the discharge of the pledge, before he shall be called upon to bear a burden imposed upon his property by the wrongful act of his bailee": *Skiff v. Stoddard*, 63 Conn. 198; *Sillcocks v. Gallaudet*, 66 Hun, 522. As between an assignee of an insolvent broker for the benefit of creditors or a receiver and one who has purchased stock on margin and who can identify the stocks, the purchaser has the better right to the stocks: *Willard v. White*, 56 Hun, 581; *Chamberlain v. Greenleaf*, 4 Abb. N. C. 178. Where a repledge has been lawfully made by a broker, and upon his insolvency a receiver has been appointed, the receiver is not obliged to redeem the pledged stock where it would work to the injury of other creditors: *Chamberlain v. Greenleaf*, 4 Abb. N. C. 178. But if the repledged stock has been sold by the subpledgee and the surplus money arising therefrom has been turned over to the receiver, the

customers are entitled to such proceeds of their stock which has been thus disposed of: *Chamberlain v. Greenleaf*, 4 Abb. N. C. 178.

Broker's Remedies.—Where a broker follows his legal rights in making a purchase or sale on margin for his customer, he is entitled to recover for any loss he may have suffered in excess of the margins deposited with him as security. "It is necessarily implied in such a contract that if the defendant should fail to keep up and maintain the margin, the plaintiff should have the right to sell the gold for his reimbursement and security, and that if he should do so, fairly and justly, that is, upon notice to the defendant, and in such a manner as to obtain the actual market value at the time of the sale, the defendant would pay the difference, as money laid out and expended at his request and for his use": *Schepeler v. Eisner*, 3 Daly, 11. The stocks being in the hands of the broker, it is in his own power to reimburse himself. The broker, however, may have rights against the purchaser, even though he converts the property and sells without notice. The general rule as to pledgees who have a lien on the thing pledged is that though they convert the pledged property by unlawfully selling it, they are entitled to retain the amount of their lien. So, in *Farrar v. Paine*, 173 Mass. 58, where brokers improperly sold stocks after the purchaser had failed to deposit additional margins, the court held that the brokers "had an interest in the property to the extent of the sum due them for which the property was held as security, and as against them the plaintiff [purchaser] to that extent was not entitled to compensation." And in *Minor v. Beveridge*, 141 N. Y. 399, 38 Am. St. Rep. 804, the court said that "where a stock broker sells without due notice stock purchased by him for a customer, on a margin, and held in pledge to secure the advance made by him for the purchase, he does not thereby, as matter of law, extinguish all claim against the customer for the advance, but the customer is entitled to be allowed as damages the difference between the price for which the stock sold and for which he received credit, and its market price then or within such reasonable time after notice of sale as would have enabled him to replace the stock in case the market price exceeded the price realized." The principal case furnishes an excellent example of the extensive remedies brokers may acquire against their customers through the medium of a stock exchange with its customs and established rules. The rights and remedies of a broker as sanctioned by these customs are upheld by the courts even though the customer was ignorant of their existence: See, also, *Taylor v. Bailey*, 169 Ill. 181.

VEGA STEAMSHIP Co. v. CONSOLIDATED ELEVATOR Co.

[75 MINNESOTA, 308.]

BILL OF LADING—CARRIER AS INSURER.—A provision in a bill of lading that all the deficiency in a cargo of wheat shall be paid by the carrier and deducted from the freight, makes the carrier an insurer that the amount of wheat called for had been delivered to it, and would be redelivered at the end of the route.

CARRIERS—SUBROGATION TO CONSIGNEE'S RIGHTS.—A carrier, who has paid the consignee for a deficiency in the quantity of wheat delivered to it by the owner of a grain elevator, is subrogated to any right of action which the consignee may have had against the owner of the elevator by reason of such deficiency.

CONSTITUTIONAL LAW—WEIGHING GRAIN—POWER OF LEGISLATURE.—A statute is in excess of the powers of a legislature which makes conclusive the action of a state weighmaster in weighing grain at terminal elevators. Such a law is an arbitrary exercise of power, and attempts to deprive a person of his day in court by closing his mouth absolutely when he comes into court.

CONSTITUTIONAL LAW — ELEVATORS WEIGHING GRAIN.—The business of handling grain in elevators is affected with a public interest and may be regulated by the legislature. Hence, the legislature may provide that the act of a weighmaster in weighing grain can be impeached only when the party complaining was himself free from fault or negligence, and when it is demonstrated by clear, strong, and satisfactory evidence that there was in fact a substantial mistake in the weighing.

ARBITRATION.—THE DECISION OF AN UMPIRE can only be impeached for fraud or such gross mistake as would imply bad faith or a failure to exercise an honest judgment.

Searle & Spencer, for the appellant.

Davis, Kellogg & Severance, for the respondent.

310 CANTY, J. Plaintiff is a common carrier of freight on the Great Lakes, between Duluth and Buffalo. Defendant owns and operates a public elevator at the dock in Duluth, in which the wheat of different parties is stored, commingled in a common mass.

On October 20, 1896, Spencer, Moore & Co. proceeded to ship from Duluth to Buffalo, on plaintiff's steamship, the "Vega," ninety-seven thousand five hundred and eighty-seven bushels of wheat. This wheat was stored in said elevator, and, while being delivered from the elevator to the ship, was weighed out by the assistant state weighmaster, under the laws of Minnesota. The cargo of wheat was delivered at Buffalo, but it is claimed that it fell short in weight, and that, by reason of mutual mistake in weighing the wheat at Duluth, one thousand and sixty-two bushels less than the required amount were delivered on board the ship. The bills of lading delivered by

plaintiff to Spencer, Moore & Co. contain the following provisions: "All the deficiency in cargo to be paid by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee."

When the wheat was delivered at Buffalo to Spencer, Moore & Co., the consignees, they deducted from the freight the sum of eight hundred and sixty-nine dollars and sixty-four cents, the market value of the one thousand and sixty-two bushels; and plaintiff brought this action to recover this amount from defendant.

On the trial the court ordered a verdict for defendant, and, from an order denying a new trial, plaintiff appeals.

1. We are of the opinion that, by reason of said clause in the bill of lading, plaintiff was an insurer that the amount of wheat called for had been delivered to it, and would be redelivered at the end of the route; and, when plaintiff paid the consignee for the deficiency, any cause of action held by the consignee therefor against defendant passed, by subrogation, to plaintiff.

³¹¹ 2. Defendant claimed it had delivered the amount called for by the bills of lading. Elevator receipts for that amount were surrendered at the time.

On the trial, plaintiff offered to prove that there were in fact delivered from the elevator to the ship, at Duluth, one thousand and sixty-two bushels less wheat than the bills of lading called for. Defendant objected to the offer, and the court sustained the objection. This is assigned as error. Section 7675 of the General Statutes of 1894 provides: "Said state weighmaster and assistants shall, at the places of St. Paul, Minneapolis, Duluth, and St. Cloud, supervise and have exclusive control of the weighing of grain and other property which may be subject to inspection, except when otherwise ordered or directed by the party shipping the same, and the inspection of scales; and the action and certificates of such weighmaster and his assistants in the discharge of their aforesaid duties shall be conclusive upon all parties, either in interest or otherwise, as to the matters contained in said certificates."

It seems that the trial court held that, under this section, the result arrived at by the state weighmaster in weighing this wheat at Duluth is conclusive, and cannot be questioned in this action. In answer to this, appellant cites section 7706, which is a part of the same act, and reads as follows: "Said weighmaster and assistants shall give, upon demand to any person

or persons having weighing done, a certificate under his hand and seal, showing the amount of each weight, number of car or cars weighed, if any, the initial of said car or cars, place where weighed, date of weighing, and contents of car. And it is hereby provided that said weighmaster's certificate shall be admitted in all actions either at law or in equity, as prima facie evidence of the facts therein contained, but the effect of such evidence may be rebutted by other competent testimony."

These two sections are in *pari materia*, and must be construed together. They are in some respects in direct conflict with each other, but that conflict must be reconciled if it is reasonably possible to do so.

Section 7675 does not attempt to make anything conclusive but the weight ascertained and the certificate of that fact, and does not provide for certifying to other facts. Section 7706 provides for certifying to a number of other facts, such as the number of cars, ³¹² the initials of the car or cars, the contents of the car or cars, and the place where weighed. When these additional facts are certified to, the certificate itself is only prima facie evidence of any fact therein certified. But, if the weight is proved by competent evidence other than the certificate provided by section 7706, the intent of the statute is that such weight shall be conclusive.

3. But is it competent for the legislature to make the weight thus ascertained absolutely conclusive? We are of the opinion that it is not. The legislature cannot in this manner provide for the arbitrary exercise of power, so as to deprive a person of his day in court to vindicate his rights. And the law which closes his mouth absolutely when he comes into court is the same, in effect, as the law which deprives him of his day in court: See Cooley's Constitutional Limitations, 6th ed., 452; 6 Am. & Eng. Ency. of Law, 2d ed., 1050; *Graves v. Northern Pac. R. R. Co.*, 5 Mont. 556, 51 Am. Rep. 81; *Johns v. State*, 55 Md. 350; *Wantlan v. White*, 19 Ind. 470.

But we must give to the legislative intent the utmost effect which the constitution will permit. The statute in question is a police regulation. The business of storing and handling grain in such an elevator is affected with a public interest, is merely a link in the chain of commerce, and may be regulated by the legislature to a very considerable extent: See *Munn v. Illinois*, 94 U. S. 113, 126.

The legislature has the right to give to the act of the weighmaster in weighing grain a high character as evidence, and to

provide that such act can be impeached only when the party complaining or the party under whom he claims was himself free from fault or negligence, and when it is demonstrated by clear, strong, and satisfactory evidence that there was in fact a substantial mistake in the weighing. No trivial error or trivial variation between different weights is sufficient to impeach the weighing of the state weighmaster; but the alleged error in this case is one thousand and sixty-two bushels in a total of ninety-seven thousand five hundred and eighty-seven, and that is sufficiently substantial.

In our opinion, the case is not exactly parallel to one where the parties, by voluntary contract, provide for an umpire to decide on the matters which will arise between them. There the decision of the umpire can only be impeached for fraud or such gross mistake ³¹³ as would imply bad faith or a failure to exercise an honest judgment: *Leighton v. Grant*, 20 Minn. 298 (345); *St. Paul etc. Ry. Co. v. Bradbury*, 42 Minn. 222; *Langdon v. Northfield*, 42 Minn. 464; *Shaw v. First Baptist Church*, 44 Minn. 22.

Under the statute, the party running the elevator has no option as to whether or not the state weighmaster shall weigh the grain; and, in our opinion, the state cannot force an umpire upon such party against his will, and then close his mouth, so that he cannot show that the umpire has made a substantial mistake, whether that mistake is the result of fraud or bad faith, or merely of negligence.

Under the constitution, no sound distinction can be made on the difference between a case of bad faith and a case of mere negligence. If a gross error has been committed, and his mouth is closed by the statute, he will be deprived of his property without due process of law, whether the error is the result of bad faith or not. True, in this case, the party running the elevator is not the one who is complaining. The plaintiff is enforcing merely the rights of the shipper, with whom, under General Statutes of 1894, section 7675, it is optional whether the grain shall be weighed by the state weighmaster or not.

The law does not force this statutory umpire upon the shipper. The umpire is one of his own selection, and it may be contended that, as to him, the case is the same as that of a case where the parties voluntarily agreed on an umpire, and that, therefore, he cannot impeach the weighmaster's decision without showing fraud or such gross mistake as will imply bad faith. But the statute never intended to make the weighing conclu-

sive as to the shipper, and not conclusive as to the party operating the elevator. In this respect the rights of the parties should be held to be mutual and reciprocal, and the weighmaster's decision no more conclusive as to the one than it is as to the other. The legislature never intended to give the party running the elevator an advantage in this respect. The weighing contemplated by the statute is a weighing in the course of delivery, and as a part of that delivery. There are three parties to the transaction, the shipper, the elevator keeper, and the state weighmaster, who is umpire for the other two.

In this case the weighmaster was acting as umpire for the shipper ³¹⁴ and defendant; but, by reason of said clause in the bill of lading guaranteeing the weight, the plaintiff stepped into the shoes of the shipper in attending to the weighing and delivery of the wheat. Then, if plaintiff can, by clear, strong and satisfactory evidence, prove the alleged error as a demonstrable mistake of fact, and can further prove that it was not guilty of any fault or negligence which contributed to that error, it should have been allowed to do so. Plaintiff should have been allowed to introduce the offered evidence.

The order appealed from is therefore reversed and a new trial granted.

BILL OF LADING—WHEN CONCLUSIVE AS TO QUANTITY. Ordinarily, a bill of lading is not conclusive as to the amount of goods shipped. However, if it contains the phrase "quantity guaranteed," it becomes conclusive evidence of the quantity and renders the carrier liable for any shortage: Monographic note to Chandler v. Sprague, 38 Am. Dec. 413, 414. See this note, pages 407-426, on bills of lading in general.

GRAIN ELEVATORS—STATE REGULATION OF.—Grain elevators are charged with a public interest, and statutes regulating them are justifiable: People v. Budd, 117 N. Y. 1, 15 Am. St. Rep. 460.

STATUTE MAKING APPRAISERS' VALUATION CONCLUSIVE.—An act of the legislature rendering railroad companies liable for cattle killed by them at a value to be fixed conclusively by appraisers is unconstitutional: Graves v. Northern Pac. R. R. Co., 5 Mont. 556, 51 Am. Rep. 81. See, also, St. Paul etc. R. R. Co. v. Gardner, 19 Minn. 132, 18 Am. Rep. 334. For a statute making certain evidence conclusive, see McCready v. Sexton, 29 Iowa, 356, 4 Am. Rep. 214.

ARBITRATION—IMPEACHMENT OF AWARD.—The award of arbitrators will not be disturbed without clear proof of corruption, partiality, or misconduct on their part: Brush v. Fisher, 70 Mich. 469, 14 Am. St. Rep. 510, and extended note.

McGOVERN v. McGOVERN.

[75 MINNESOTA, 814.]

WILLS—ERRONEOUS DESCRIPTION OF LAND.—A will purporting to dispose of the northeast quarter of a certain section which the deceased did not own, does not devise the southeast quarter of the same section which the deceased did own, since if the false description in the will is rejected as surplusage, there is no description left by which the land intended to be devised can be identified.

H. L. Schmitt and Lorin Cray, for the appellant.

W. E. Young, for the respondent.

315 CANTY, J. In 1882 Thomas McGovern made a last will. He died the next day and the will was probated. The will provides: "After paying my lawful debts and funeral expenses, I give, devise, and bequeath to my wife, Mary McGovern, the northeast quarter of section 6, in township 107, range 25 and all the personal property that I may become possessed of at my death."

The deceased never owned or had any interest in said northeast quarter, but did own at the time of making his will and at the time of his death the southeast quarter of that section, and resided on the same with his wife and family. He owned no other land. **316** The court below held that this will did not dispose of the real estate so owned by the deceased, and awarded it to the heirs at law. Those claiming under the will appeal to this court.

In our opinion, the judgment appealed from should be affirmed. The will does not in any form state that the deceased owned the land which the will purported to devise, and if the false description in the will is rejected as surplusage, there is no description left by which the land intended to be devised can be identified: See Schouler on Wills, secs. 268, 269; 1 Jarman on Wills, 6th ed., 412 et seq.

Judgment affirmed.

WILLS—ERROR IN DESCRIPTION.—A will purporting to devise "the southeast quarter of the southwest quarter of section 8," operates as a devise of the northeast quarter of the southeast quarter of that section, if that was the only land owned by the testator: Rook v. Wilson, 142 Ind. 24, 51 Am. St. Rep. 163, and note.

SVANBURG v. FOSSEEN.

[75 MINNESOTA, 350.]

SPECIFIC PERFORMANCE OF ORAL CONTRACT TO CONVEY REAL PROPERTY.—Where the consideration for the purchase of lands consists of services to be rendered, which are of such a peculiar character that it is impossible to estimate their value to the vendor by a pecuniary standard, and he did not intend to measure them by such a standard, the performance of the services entitles the vendee to a specific performance, notwithstanding the contract was in parol.

SPECIFIC PERFORMANCE—ORAL CONTRACT TO CONVEY LANDS.—Where an uncle and aunt take three infant nieces into their family, upon an oral agreement that the nieces shall give their services until grown up, and the uncle and aunt will leave to them all their real and personal property which they might own at the time of their death, the services to be performed by the nieces are of such a character that a performance entitles them, upon the death of the uncle and aunt, to a specific performance of the promise to convey the property.

JURISDICTION.—A PROBATE COURT has no jurisdiction over actions for the specific performance of parol contracts for the conveyance of real estate. Hence, a person is not barred to enforce such a contract in a court of general jurisdiction, even though a will has been proven in the probate court, and such court has by decree fixed the status of the estate.

PLEADING.—A DEMURRER, which is directed merely to the want of jurisdiction and to the insufficiency of facts stated to constitute a cause of action, does not reach the objection that there is a nonjoinder or misjoinder of parties.

O. Mosness and M. L. Fosseen, for the appellant.

John M. Rees, for the respondent.

353 BUCK, J. Appeal by defendant from an order overruling a demurrer to plaintiff's complaint. The grounds of the demurrer are: 1. That the court has not jurisdiction of the subject matter of the causes of action therein stated; 2. That the complaint does not state facts sufficient to constitute a cause of action.

The facts stated in the complaint and admitted by the demurrer are as follows: The plaintiff, whose maiden name was Caroline H. Hanson, when a year and a half old, with two sisters under six years of age, came with their father from Europe to America, to live with their uncle and aunt, James and Anna Mary Fosseen. James Fosseen died about December 3, 1894, and his wife died April 5, 1891. Plaintiff and her said sisters lived for several months with their said uncle and aunt after their arrival in this country, and thereafter they lived

part of the time with the Fosseens and part of the time with their father, until about January 23, 1876, when plaintiff's father died. At that time plaintiff was about eight years old, and her sisters were then of the respective ages of ten and thirteen years. Immediately after the death of their said father the plaintiff and her said sisters, as aforesaid, and the said James and Anna Mary Fosseen, contracted orally by and between each other, in fact and in substance, as follows: That if the plaintiff and her said sisters would come to the house of the said James and Anna Mary Fosseen, as aforesaid, and live with them and give them their services, as they should be directed, until they had grown up, in consideration thereof, at their death, said James Fosseen and his said wife would give and leave to the plaintiff and her said sisters, as aforesaid, all the property, both real and personal, which they then owned and which they might own at the time of their death.

Relying upon said promises and agreements, and in pursuance of said contract as aforesaid, the plaintiff lived at the house of said James Fosseen and his said wife and gave them her services, as requested, daily and continuously, until she was twenty-one years of age, when she was married to Charles H. Svanburg, her present husband. The services so rendered by the plaintiff, as aforesaid, cannot be enumerated specifically, but they consisted of housework ³⁵⁴ of every kind and character, all work in and about the house, of every nature, required in housekeeping and in running and maintaining a home, of sewing, washing, ironing, of care and nursing for said James Fosseen and his said wife, and much other and different kind of work done and performed outside of the dwelling-house in many and different ways as requested by the said James Fosseen and his said wife. During said time, as aforesaid, a strong affection existed between said James Fosseen and his wife and the plaintiff and her said sisters, aforesaid, and the labor and services, as aforesaid, and the relationship herein described, were daily and continuous until the plaintiff was married, as herein alleged. The plaintiff never received any compensation or wages whatever for her said work and services nor for any part thereof.

These sisters inherited real estate of value of two thousand dollars, and about December 1, 1885, they made an additional contract with the said Fosseens, as follows: That if said plaintiff and her sisters would sell and convey their said real estate to one Swen Anderson, or to some other person whom said

James and Anna Mary Fosseen would name, and give the money and proceeds thereof to said James Fosseen and his said wife, said James and Anna Mary Fosseen, and each of them, in consideration thereof, would, by deed or by will, convey or bequeath to said plaintiff and to her said sisters, as aforesaid, all the property which they then had or which they might thereafter acquire, both real and personal, in equal parts, such conveyance to take effect at the demise of the said James and Anna Mary Fosseen, and that said James and Anna Mary Fosseen, in consideration of the premises, would give and leave to the plaintiff and her said sisters, at their death, all the personal property which they should own at their demise. Said deed or will, as aforesaid, was to be left at the death of said James and Anna Mary Fosseen, or the title to all of said property, at their decease, was to be left in this plaintiff and her said sisters, as aforesaid.

Said plaintiff and her said sisters, relying upon said promises and agreements, as aforesaid, were thereby induced to, and did thereupon, sell, deed, and convey their said real property, as aforesaid, to one Swen Anderson, at the request and solicitation of said James and Anna Mary Fosseen, at the price and for the sum of thirteen hundred dollars. ³⁵⁵ Nearly all of said sum of thirteen hundred dollars was upon said December 1, 1885, or immediately thereafter, paid to said James and Anna Mary Fosseen, by and with the consent of the plaintiff and her said sisters. Thereafter the balance of said thirteen hundred dollars was paid to and turned over by said Swen Anderson to said James and Anna Mary Fosseen, by and with the consent of the plaintiff and her said sisters, and the whole of said thirteen hundred dollars, as aforesaid, was, by and with the consent of the plaintiff and her said sisters, paid to said James Fosseen and Anna Mary Fosseen, and was by them used and appropriated to their own use. Neither of the Fosseens, by deed, conveyance, will, or otherwise, in any manner during their lifetime made or executed any papers, nor did they, by gift or otherwise, give or leave the title to any of the property which they owned at the time the contract was made, or which they died seised of, as hereinafter alleged and set forth, to this plaintiff or to her said sisters, or to either of them.

James Fosseen died seised of a large amount of real estate, a portion of which is specifically described in the complaint, situate within the jurisdiction of the court; and it is also alleged in the complaint that the defendant executor has disposed of a

large portion of the estate, and now has the proceeds thereof in his hands. After the decease of James Fosseen the defendant, Osman Fosseen, qualified as the executor of said will, and is engaged in settling the estate in accordance with the terms thereof, but has not distributed any portion thereof to the beneficiaries therein named. He gave a bond for only five thousand dollars, whereas the said estate is of the value of about twenty-five thousand dollars.

The relief asked in the complaint is that plaintiff be adjudged the owner of an undivided one-third of the real and personal property of which James Fosseen died seised; that said executor be enjoined from disposing of the same, as he is not financially responsible; that he be enjoined from paying to the beneficiaries in said will named any of said property, or conveying any thereof to said beneficiaries, but that one-third should be conveyed and turned over and paid to plaintiff. The demurrer was overruled, and defendant appeals.

³⁵⁰ It is proper to state that the other two nieces have each brought similar actions in equity in the district court, praying for the same relief, and a stipulation has been entered into between the parties whereby such actions shall abide the event of the decision in this case.

The two questions more distinctly brought before us for consideration are: 1. Are the contracts, or either of them, set forth in the complaint within the statute of frauds? 2. Was the probating of the will a final determination of all the interests of the plaintiff and her sisters in the property of the deceased?

The law is too well settled to need argument or citation of authorities that a person may make a valid obligation which is not within the statute of frauds, binding himself to make his will in a certain way, and thereby give certain property to a particular person or persons, and that such contract may be specifically enforced if such contract is not in itself unlawful. Under our statute of frauds (Gen. Stats. 1894, sec. 4215), "every contract for the leasing for a longer period than one year, or for the sale, of any lands or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized, in writing."

But by section 4216, same statute, it is provided that "nothing in this chapter contained shall be construed to abridge the power of courts of equity to compel the specific performance

of agreements, in cases of part performance of such agreements."

The original statute of frauds was passed in the reign of Charles II, and a majority of the American states have enacted laws substantially, in legal effect, the same as the English statute. Section 4215 of our statute above quoted is an illustration: "The controlling motive of the statute is one of expediency and convenience, and this motive has always been kept in view by the ³⁵⁷ ablest courts in their work of interpretation. As its primary object is to prevent mistakes, frauds, and perjuries, by substituting written for oral evidence in the most important classes of contracts, the courts of equity have established the principle, which they apply under various circumstances, that it shall not be used as an instrument for the accomplishment of fraudulent purposes; designed to prevent fraud, it shall not be permitted to work fraud. This principle lies at the basis of the doctrine concerning part performance, but is also enforced wherever it is necessary to secure equitable results": Pomeroy on Contracts, sec. 71.

In the very nature of human legislative enactments, it is sometimes impossible to guard against every case of fraud, but equity, with its remedial powers, frequently steps in where law has failed or is powerless to accomplish the desired effect. And the legislature, recognizing the great wrongs that may sometimes be perpetrated in the name and under color of law, has enacted section 4216, above quoted, whereby equity may be invoked to stay the iniquities of those who rely upon the rigid rules of law; and it has thus made part performance a ground for the more perfect administration of justice. There are certain special features in the contract herein involved, appearing in the relation of the parties, in the terms of the subject matter, and in the full performance on the part of the plaintiff, where damages would be inadequate if not impracticable. These special features and incidents of the contract and the relations of the parties are, in our opinion, sufficient to bring the case within the rules justifying an action for specific performance in behalf of plaintiff, whereby her interests can only be satisfied by an actual fulfillment of the stipulations which have been made for her benefit, and are justified by the authorities.

In the case of *Slingerland v. Slingerland*, 39 Minn. 197, in an action to compel specific performance for conveyance of land, the plaintiff was never in the possession of the land and never made any improvements thereon. The defendant was

the father of the plaintiff and owned a large farm; and the son had brought several different actions or proceedings against the father, each being practically a party in interest, and the father had one suit as plaintiff against the son, and all of them being on the court calendar for trial, the father proposed orally to the son that if he would dismiss ³⁵⁸ the action brought by him, and consent that the money involved in the other action should be paid to the father, and the proceedings discontinued, he (the father) would convey to the son a certain farm and the personal property belonging to it on the day when the son should be married to a young lady named. The son accepted the proposition, dismissed four actions, and the money involved in the other action was paid to the father, and the proceedings discontinued. The son married the young lady, but the father refused to make the conveyance agreed upon. An action by the son for specific performance was sustained, the court holding that the son could not be restored in respect to the action and proceedings to the position he was in at the time of making the oral agreement, nor could any action for damages he might bring put him in as good position, and that the agreement was not within the statute of frauds. In that case it was further stated that in case of payment in services, if their character be such that it is impossible to estimate their value by any such standard, the performance of them is a part performance: Citing, among other authorities, *Rhodes v. Rhodes*, 3 Sand. Ch. 305 (279). In that case it was held: "In general, the payment of the consideration is not such a part performance of a parol agreement for the purchase of lands, as will relieve it from the operation of the statute of frauds. But where the consideration consists of services to be rendered, which are of such a peculiar character that it is impossible to estimate their value to the vendor by a pecuniary standard, and the vendor did not intend to measure them by such a standard, the performance of the services will entitle the vendee to a specific performance, notwithstanding the contract was by parol. This was held of an agreement made between two brothers, who had always lived together and owned their property in common, by which the one having a family agreed to provide for and take care of the other, who had no family, and who was subject to epileptic fits, during his life, in consideration that the former should have all the real and personal estate of the latter. Held, also, that the contract was so far certain and reasonable in its terms that it ought to be enforced in equity."

The doctrine of that case is cited with approval by Pomeroy in his work on Contracts, second edition, page 161, where he says that the principle of this case is sound. He further says: "But, if the services are of such a peculiar character that it is impossible ³⁵⁹ to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, then the plaintiff, after the performance of these services, could not be restored to the situation in which he was before, or be compensated by any recovery of legal damages. Under these circumstances, the rendition of the services, or the procuring them to be rendered, is a part performance of the verbal agreement, and the case is quite analogous to those in which outlays are made for improvements by a vendee or lessee under a parol contract. This principle is, at bottom, the same as that upon which the courts have proceeded, especially in a series of recent English decisions, in specifically enforcing certain agreements for continuous acts of labor and services, and construction of works where the legal remedy of damages for their breach is impracticable. It has also been applied under analogous circumstances, where the plaintiff has not, indeed, made any payment, but has done other acts in pursuance of the verbal agreement, but not directly affecting its subject matter, which would leave him without adequate remedy unless the contract is enforced. . . . Payment of the price, although not of itself sufficient to admit the equitable remedy, is always regarded as a strong circumstance in connection with other acts, such as possession or the making improvements."

In *Davison v. Davison*, 13 N. J. Eq. 246, the services of Olson were held to be a good part performance of his father's verbal agreement to leave him a farm after the father's death.

Vanduyne v. Vreeland, first reported in 11 N. J. Eq. 370, and on a second hearing in 12 N. J. Eq. 142, was a case in which "the father of an infant child made an agreement with an uncle of the infant, at the uncle's request, to this effect: That the uncle should take the infant, and adopt him as his own child, and that he would treat him as his own son, and that the property he should have should be given to the child, so that it should belong to him at the death of the uncle and his wife. The uncle took the child, and had him baptized, and the child assumed his surname and lived with him twenty-five years. Held, that the child might maintain his bill upon the agreement after such performance."

Wright v. Wright, 99 Mich. 170, was a case in which defendant, in his second year, was indentured to deceased until his majority. When he was eight, deceased and his wife, being childless, adopted him, under the law then in force, and his name was changed. He gave them his entire services, without pay, till ³⁶⁰ he was over twenty-two, when deceased died. The widow testified that they intended that he should be their heir; that her husband believed that this was effected by the adoption; that defendant thought he was their child till after her husband's death; and that they never talked about paying him for his services. The adoption law was held unconstitutional. Held, that defendant's performance entitled him to the inheritance, by way of specific performance of the oral contract.

In Missouri, in the case of Sutton v. Hayden, 62 Mo. 101, a case in which one Mrs. Green made an agreement by which she took, in its infancy, the child of her brother, upon the understanding that at her death all the property owned by her should go to the child, the child was to come and live with her, be as a daughter to her, and take care of her for the remainder of her life. The child entered upon the performance of her part of the agreement, and throughout the course of Mrs. Green's life rendered the services, and, so far as lay in her power, performed her part of the agreement. Mrs. Green died without having in any way secured the property to the child. The court, at page 114, said: "There are things which money cannot buy, a thousand nameless and delicate services and attentions, incapable of being the subject of explicit contract, which money, with all its peculiar potency, is powerless to purchase. The law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation in that direction, by decreeing the specific execution of the contract." See, also, Sharkey v. McDermott, 91 Mo. 655, 60 Am. Rep. 270, where it was held: "An agreement by a man and his wife to adopt a child, provide and care well for her, and leave her their property at their death, performed on the part of the child, is enforceable as to the property on their death."

In Brinton v. Van Cott, 8 Utah, 480, it was held as follows: "A verbal contract, whereby plaintiff agrees to live with and take care of an old woman until her death, in consideration of her promise to leave all her property to plaintiff, is taken out of the statute of frauds by the rendition of the services during

the lifetime of the ³⁰¹ woman, and, after her death, equity will specifically enforce the contract, on the theory of part performance, since the services rendered are of a peculiar character, not intended by the parties to be measured by a pecuniary standard. A contract by which an old woman, in apparent good health, and having the expectancy of many years of life, agrees to leave all her property, worth about five thousand dollars, to a sixteen year old girl, in consideration of the latter's promise to live with and take care of her as long as she lives, is not void for want of mutuality and fairness; and after her death the contract will be specifically enforced in favor of the girl, who performed her part of the agreement, though the woman died within three or four months after the execution of the contract."

The court, at page 482, said: "In this territory [Utah] the statute of frauds is in full force: 2 Comp. Laws, sec. 2831. It is therefore incumbent upon the appellant to show by her complaint that she has partly or wholly performed her contract, so as to take it out of the statute of frauds. 'When the consideration of the agreement consists in work, labor, and services personally done and rendered by the plaintiff, if the value of the same can be ascertained with reasonable accuracy in an action at law, and adequately compensated by the recovery of damages, then neither the services themselves nor the payment for them will avail as a part performance of the verbal agreement. But, if the services are of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, then the plaintiff, after the performance of these services, could not be restored to the situation in which he was before or be compensated by any recovery of legal damages.' Under these circumstances, the rendition of the services is a part of the performance of a verbal agreement. The act of part performance of a verbal agreement for services must be such that it would be a fraud upon the party performing for the other party to refuse to perform his part as agreed between them: Pomeroy on Contracts, 114." See, also, *Korminsky v. Korminsky*, 2 Misc. Rep. 138; 21 N. Y. Supp. 611; *Godine v. Kidd*, 64 Hun, 585; 19 N. Y. Supp. 335; *Jaffee v. Jacobson*, 48 Fed. Rep. 24; 4 U. S. App. 4; *McKinnon v. McKinnon*, 56 Fed. Rep. 409; *Haines v. Haines*, 6 Md. 435.

In the recent case of *Kofka v. Rosicky*, 41 Neb. 328, 43 Am. St. Rep. 685, a girl about seventeen months old was given by

her parents to her uncle and aunt, under an agreement that they would adopt her, and rear, nurture, and educate her, and that she was to be as their own child, ³⁶² and at their death to receive all the property which they might own. She lived with them until they died, some ten years, took their name, did not recognize or know her own father and mother in their true relation, but knew them as and called them uncle and aunt, and knew and recognized her uncle and aunt as father and mother. The uncle died intestate, possessed of real estate. It was held there was such a part performance of the contract by the parties thereto as entitled the child to a decree giving her the title to the property, by way of specific performance of the contract.

Now, the first contract brings this case within the doctrine above stated. The Fosseens were childless. They took these children as members of their own household. A strong affection grew up between the sisters and their foster parents. For many years they rendered faithful services to their uncle and aunt, doing household work of every kind, as well as outdoor work. They nursed and cared for these old people, and in no respect were they disobedient, negligent, or unfaithful in their duties or attentions to their uncle and aunt. It is a fair inference that these childless old people regarded these nieces with a love and affection almost akin to that of parents for their own children, and, in return, the services and society of these children to them were of great benefit and pleasure. The value of such society and services to their uncle and aunt is incapable of measurement in money: *Emery v. Darling*, 50 Ohio St. 160-167; *Rhodes v. Rhodes*, 3 Sand. Ch. 279.

The services were continuous for many years until plaintiff was married, when she was twenty-one years old. The first contract would alone entitle the plaintiff to a specific performance. But the Fosseens encouraged and induced the plaintiff and her sisters to enter into the second contract, not that the Fosseens were, in substance, to do any more for the sisters than they had agreed to do under the first contract, but to procure from the sisters a further and valuable consideration to themselves. When their father died, in 1876, he left them real estate of the value of two thousand dollars, which the Fosseens induced them to sell; and, to please and satisfy these foster parents, they sold the real estate for thirteen hundred dollars, or seven hundred dollars less than its actual value, and paid the consideration to the Fosseens, upon their further ³⁶³

promise to do just what they had, years before, previously promised to do—leave their property at their death to the sisters; and this payment of such money was a strong circumstance, creating an additional equity for the enforcement of this action.

Now, courts of equity will not allow the statute of frauds to be used as an instrument of fraud: *Bork v. Martin*, 132 N. Y. 280, 28 Am. St. Rep. 570. And, where a person tacitly encourages an act to be done, he cannot afterward exercise his legal right in opposition to such consent, if his conduct or active encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adverse claim: *Swain v. Seamens*, 9 Wall. 254. One of the underlying principles upon which an action for specific performance may be enforced is that the plaintiff cannot be restored to the situation in which he was before the contract was made, and cannot be compensated by the recovery of legal damages: *Slingerland v. Slingerland*, 39 Minn. 197; *Pomeroy on Contracts*, 162. The land sold by the sisters at a loss of seven hundred dollars could not be restored to them, especially as the consideration received by them had passed into the hands of the Fosseens and beyond the control of the sisters, and hence they could not be placed in statu quo.

While the complaint is not complete in its description of all the property of which James Fosseens died seised nor of that sold, and the proceeds of which are held by the defendant as executor, nor of the amount and kind of personal property so held by the defendant, yet, as against the demurrer, there is enough real property the subject of the action, specifically described, to entitle the plaintiff to maintain this action. It is also to be noted that the contracts provided that the sisters should have the Fosseens' personal property on their decease; hence, the contract was an entirety, and must be enforced as such: *Mann v. Higgins*, 83 Cal. 66.

Great stress is placed by the appellant upon the fact, as he alleges, that the plaintiff has had her day in court; that the will has been proven, and her claim has not been presented or allowed in the probate court; and that such court has fixed the status of the estate. It is a sufficient answer to this contention to say that this is not an action for the construction of a will, or for the distribution of any ³⁶⁴ property thereunder. The probate court has no jurisdiction over actions for the specific performance of parol contracts for the conveyance of real estate.

Sections 4623 to 4631, chapter 45a, title 10, of the General Statutes of 1894, providing that the probate court may decree the conveyance of land, give that court jurisdiction only where the contract for conveyance is in writing; and it cannot decide controverted questions arising upon the merits even in such cases, but must leave the applicant or petitioner to his remedy by action: *Mousseau v. Mousseau*, 40 Minn. 236. Hence, if the probate court had no jurisdiction to hear this case, the plaintiff is not barred of her rights to enforce her contract in a court of general jurisdiction.

There is no merit in the contention of the defendant that the complaint does not show that the Fosseens had either jointly or separately any property whatever while they lived. Their promise was by the first contract to give and leave to plaintiff and her sisters all the property, both real and personal, which they owned and might own at the time of their death. Subsequently, by the terms of the second contract, said James Fosseens and Anna Mary Fosseens, and each of them, agreed to convey by deed or bequeath to said plaintiff and her sisters said property, such conveyance to take effect upon their demise. This would include all the property which they owned jointly and separately.

The last point raised goes to the nonjoinder of parties plaintiff and defendant. But the demurrer is one as to want of jurisdiction and insufficiency of facts stated to constitute a cause of action, and does not reach the objection that there is a defect of parties, either by nonjoinder or misjoinder.

Order affirmed.

SPECIFIC PERFORMANCE OF A VERBAL CONTRACT TO CONVEY LAND may be decreed if the contract is specific, the purchase money paid, and the plaintiff in possession at the time of the purchase: *Butler v. Thompson*, 45 W. Va. 660, 72 Am. St. Rep. 838, and note. See, too, *Parrill v. McKinley*, 9 Gratt. 1, 58 Am. Dec. 212; *Emmel v. Hayes*, 102 Mo. 186, 22 Am. St. Rep. 769; *Maddox v. Rowe*, 23 Ga. 431, 68 Am. Dec. 535.

SPECIFIC PERFORMANCE—PAROL CONTRACT TO MAKE A CHILD HEIR.—An agreement by a man and his wife to adopt a child, provide for her, and leave her their property at their death, if performed on the part of the child, is enforceable: *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270. Compare *Shahan v. Swan*, 48 Ohio St. 25, 29 Am. St. Rep. 517; *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222.

PLEADING—DEMURRER.—To interpose a general demurrer to a whole bill or declaration, and then to assign some causes of demurrer going only to specific parts thereof, is an unwarranted practice: *Washington v. Soria*, 73 Miss. 665, 55 Am. St. Rep. 555. A demurrer on the ground of defect of parties must specifically point out the defect relied on: *Mitchell v. Thorne*, 134 N. Y. 536, 30 Am. St. Rep. 699, and note.

PETERSON v. WESTERN UNION TELEGRAPH CO.

[75 MINNESOTA, 368.]

LIBEL.—VINDICTIVE DAMAGES may be awarded in an action for libel, where the publication was malicious.

LIBEL.—A CORPORATION may become responsible for the publication of a libel, even in punitive damages.

LIBEL.—LIABILITY OF TELEGRAPH COMPANY.—Where the agent of a telegraph company, acting within the scope of his authority, maliciously transmits a libelous message to another agent of the same company for delivery to a third person, the telegraph company is liable in punitive damages.

LIBEL.—EXCESSIVE DAMAGES.—Where the only publication of a libelous writing has been a transmission by one agent of a telegraph company to another agent of the same company, a verdict of two thousand dollars against the telegraph company is excessive.

Ferguson & Kneeland, for the appellant.

S. L. Pierce, for the respondent.

370 BUCK, J. Action for libel. Verdict for plaintiff for two thousand dollars damages, motion for new trial on part of defendant, which was denied, and it appeals. The plaintiff was a state senator, whose home was at New Ulm, but, **371** the senate being in session, and while the plaintiff was attending the same at St. Paul, the defendant, through its station agent P. R. McHale, at New Ulm, sent to the plaintiff the following telegraphic message:

“S. D. Peterson, care Windsor.

“Slippery Sam: Your name is pants.

“MANY REPUBLICANS.”

This case has been before us on two former occasions: *Peterson v. Western Union Tel. Co.*, 65 Minn. 18; *Peterson v. Western Union Tel. Co.*, 72 Minn. 41, 71 Am. St. Rep. 461. Upon the first appeal this court construed the message as susceptible of a libelous meaning on its face, but held that the verdict of five thousand dollars damages against the defendant was so excessive as to justify the conclusion that it was the result of passion and prejudice. Upon the second appeal the order of the trial court denying a new trial was reversed for errors of law occurring at the trial. The case has been tried four times, the verdicts each time varying in amount.

The more distinct and important errors assigned by the appellant are: 1. That the plaintiff is not in any event entitled to

recover, under the evidence in this case, anything more than actual damages, and not entitled to punitive damages or smart money; 2. That the court erred in charging the jury that McHale, the agent of the defendant in receiving and transmitting the message in question, represented and stood in the place of the telegraph company, and that the defendant is liable and responsible for his acts and conduct in receiving and transmitting the message to the same extent that McHale would have been personally responsible had he been the owner and operator of the telegraph line; 3. That the damages awarded by the jury are excessive, and appear to have been given under the influence of passion and prejudice.

Upon the first proposition we do not agree with the contention of counsel, unless his second proposition is sound as to the acts of the agent and as to the want of liability of the company for his acts. The trial court charged the jury that, if they found from the evidence that the defendant or its agent maliciously published the libel as charged, it was their duty to return a verdict in favor of the plaintiff for such damages as he had sustained to his reputation by ³⁷² reason of the publication, and also gave as part of his charge the language used in the second assignment of error. This, of course, involves the question of the liability of the defendant for the act of the agent if he was actuated by malice or bad faith, and upon this question the jury found in favor of the plaintiff; that is, under this instruction the jury returned a verdict against the defendant for two thousand dollars. Of course, if the action had been against McHale personally for his malicious publication of the libel, and the jury had found him guilty, they could have awarded punitive, vindictive, or exemplary damages. It is clearly competent for a jury to find vindictive damages in an action for libel, where the publication was done maliciously: Newell on Defamation, Slander, and Libel, 842; Bergmann v. Jones, 94 N. Y. 51. In the last case cited it is said that, when the falseness of the libel is proven, as a general rule it is sufficient to warrant the jury in giving exemplary damages.

But the important question in the case at bar is this, Is the company itself liable for exemplary damages by reason of the act of the agent McHale, although it did not know, direct, or authorize it? The answer to this is reached by considering and determining the powers and duties of the agent, and whether he was acting within the scope of his employment.

The defendant maintained a general telegraph office at New Ulm, and there McHale had the entire management of the business. Under this power and duty his business required him, as such agent, to examine writings, messages, and communications, and transmit them to persons to whom they were addressed. From the very nature of the business, his position required him to do this. The company cannot well act in the numerous telegraph stations throughout the country except through agents. While these branch offices in general are under the management and control of a superintendent, manager, or the corporation itself, yet this agent is almost universally recognized, as he must necessarily be, as the representative of the corporation itself. In the absence of the master, the agent is the vice-principal, superintending and controlling the business there transacted, and, of course, stands in the place of the master for the time being. It is right, therefore, that the responsibility and obligation of the master should flow with the duty conferred ³⁷³ and imposed, where the representative is acting within the scope of his employment. That is the case at bar.

McHale had control of the business at the New Ulm telegraph station. He alone saw the libelous message, and sending it was a matter incident to his business, and pertaining to the particular duty of his employment. He was acting in the capacity for which he was employed, and, having this power, he was acting within the scope of his authority. He did not perform the act for his own purpose, but for that of the master who employed him, and for the master's benefit. That he abused the authority is no defense in such case. The master had the choice of his agent, and for the abuse of that agent the master should answer to the citizen who became the victim of that abuse without his fault. One who employs another to do an act for his benefit, and who has the choice of the agent, ought to take the risk of injury to third persons by the manner in which he does the business. A telegraph corporation derives its legitimate corporate powers from the law, and that law should not be violated without a corresponding liability for torts committed under it. Station agents may be irresponsible pecuniarily, and if, for their malicious acts done in the scope of their employment, the corporation is not liable, the public would be at the mercy of an unscrupulous telegraph operator; and hence, the public are greatly interested in such a question, and the liability for such wrongs should rest upon that body which by its acts creates the power

and the opportunity for committing them. It would be a lamentable condition of the rights of the citizen if, under the guise of exercising lawful corporate powers, the corporation could permit the citizen to be defamed by the false and malicious publication of its agent while acting as its duly appointed representative. In Scott and Jarnagin's Law of Telegraphs, section 138, it is said that: "The company can only perform the duty of sending and receiving a message through the intervention of an agent; and if he may willfully and corruptly interfere with commercial transactions, or malignantly expose family affairs, and not involve the company, such a ruling would stimulate the wicked; whilst, at the same time, good men would be convinced that their chances for indemnity rested alone upon the solvency of treacherous agents. We have seen no instance in the litigated cases where telegraph companies have ³⁷⁴ claimed such immunity. . . . However, the authorities are numerous and highly respectable, and conclusive except where controlled by binding local decisions, which hold the former liable for the willful acts of the latter, when done in the performance of duties assigned."

In the same work it is said (section 138a): "Aside from the statutory and common-law duty of good faith in the transmission of messages for the public, there is another sense in which telegraph companies may become responsible for mala fides and malicious use of its franchises. A libel is any false, malicious, and personal imputation, effected by any writings, pictures, or signs, tending to alter the party's situation in society or business for the worse, and a corporation may become responsible for its publication, even in punitive damages."

Mr. Wood in his work on the Law of Master and Servant, section 323, says that: "It may be regarded as settled by the better class of cases that, whenever exemplary damages would be recoverable if the act had been done by the master himself, they are equally recoverable when the act was done by his servant." And he cites the well-considered case of *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202, 2 Am. Rep. 39, where numerous authorities are collected supporting his view. It is true that this doctrine thus enunciated was applied in an action against a railroad corporation, but we perceive no distinction between it and a telegraph corporation. For "a telegraph company is liable *ex delicto* for an injury done by its agents or servants to third persons, for misfeasance as well as non-feasance": Scott and Jarnagin's Law of Telegraphs, sec. 69.

In *Shearman and Redfield on Negligence*, fifth edition, part 2, chapter 9, this question is thoroughly discussed, and it is there said: "Where the relation of master and servant exists, the master is responsible to third persons for the damage caused by the wrongful acts or omissions of his servants, in the course of their employment as such. . . . The principle which lies at the foundation of this rule has been differently stated in several judicial opinions; and the abstract justice of the rule itself has been occasionally questioned. But the soundness of the principle and the necessity of the rule, which we have inherited from the Roman law, have received ³⁷⁵ new and convincing illustrations in the immense development of modern corporations. If the rule of respondeat superior were now to be abrogated, it would be almost impossible to carry on the present complex business of society. Every person having any pecuniary responsibility would shelter himself behind the forms of a corporation, which would, in such case, be free from all responsibility for the negligence and violence of its agents, without direct evidence of authority for their acts, while such evidence could be, in almost every instance, suppressed."

This rule may frequently work a hardship, but when the master substitutes an agent or servant in his own place, and clothes him with power to act for the master's benefit in serving the public, he is not permitted to shelter himself behind the plea of nonliability for the act of the agent, and the rule of respondeat superior should not be relaxed, whether the master is a corporation or an individual.

Upon the proposition that the verdict of the jury awarding the plaintiff two thousand dollars is excessive, the court is in accord with the contention of the defendant. "The sole publication of the libel in this case by the defendant was in making it known to its own agent at St. Paul, and the damages of the plaintiff were limited to such as he sustained by reason of the publication to such agent. In view of the fact that such agent could not disclose the contents of the libel without becoming a criminal, and exposing himself to serious punishment, and that there is no evidence to justify the inference that the contents of the message ever reached the public except through the plaintiff, a verdict assessing his damages at five thousand two hundred dollars is simply farcical. It can only be accounted for on the ground that it was the result of passion or prejudice."

This is the language used by this court in disposing of this case on the first appeal: *Peterson v. Western Union Tel. Co.*, 65 Minn. 18, 24. The same facts as ground for damages appear on this appeal, but the verdict is very much less.

The criminal liability for divulging the contents of any telegraph message or dispatch intrusted to him for transmission or delivery is found in the General Statutes of 1894, section 6782, and is there made a misdemeanor, and punishable as such. This law also applies to all employés. If McHale had merely received the message, without any further act, neither he nor the company would have been liable, although he ³⁷⁶ well knew its contents. The publicity consisted in sending it to another agent or employé. If it could possibly be presumed that other employés might have heard its contents in its transmission, the same presumption exists of silence and secrecy on their part, because of their liability to punishment under the criminal law if they should divulge its contents. But it is not proven, nor can it be legally inferred, that others knew of its contents. The only person to whom its contents were divulged was the agent at St. Paul, then under a penal obligation not to divulge the dispatch except to deliver it to the plaintiff.

The transmission of the dispatch, its receipt by the St. Paul agent, and the mental distress of the plaintiff constituted the basis of his right to damages. Of course, plaintiff himself making the message public would not be ground for damages, even if so made in order to maintain his right to prosecute this action. Considering all these facts, we are of the opinion that the damages awarded are excessive; that the jury must have been actuated by passion, prejudice, partiality, or swayed by some improper influence. In such case the amount should be reduced or a new trial granted: See *Fredrickson v. Johnson*, 60 Minn. 337.

The order of the district court denying the defendant's motion for a new trial must be reversed, and a new trial granted, unless the respondent file in the office of the clerk of the district court where the trial was had a remittitur of the sum of one thousand dollars within thirty days after the mandate of this court shall be filed in said district court. In case such remittitur is so filed, the plaintiff may recover judgment upon said verdict in his behalf in the sum of one thousand dollars, and the order of the lower court stand affirmed for that amount.

EXEMPLARY DAMAGES.—A CORPORATION may become liable for exemplary damages: *Maisenbacker v. Society Concordia*, 71

Conn. 369, 71 Am. St. Rep. 213, and note. See, also, *West v. Western Union Tel. Co.*, 39 Kan. 93, 7 Am. St. Rep. 530; extended note to *Hoboken Printing etc. Co. v. Kahn*, 59 Am. St. Rep. 589-609.

LIBEL.—A CORPORATION is liable in damages for a publication of libel made by its servant or agent in the course of the business in which he was employed: *Fogg v. Boston etc. Corp.*, 148 Mass. 513, 12 Am. St. Rep. 583.

LIBEL.—EXEMPLARY DAMAGES.—In an action for libel the amount of damages is peculiarly within the province of the jury, and may be either compensatory or punitive: *Holmes v. Jones*, 147 N. Y. 59, 49 Am. St. Rep. 646, and note.

LIBEL.—EXCESSIVE DAMAGES.—A verdict for damages in an action for libel is not subject to change on appeal unless so excessive as to create the belief that the jury were misled either by passion, prejudice, or ignorance, and that the court abused its discretion in allowing the verdict to stand: *Brown v. Vannaman*, 85 Wis. 451, 39 Am. St. Rep. 860, and note. See, also, *Frankfort v. Coleman*, 19 Ind. App. 368, 65 Am. St. Rep. 412.

McCONVILLE v. ST. PAUL.

[75 MINNESOTA, 383.]

MUNICIPAL CORPORATIONS.—ABANDONMENT OF IMPROVEMENT—RECOVERY OF ASSESSMENT PAID.—Where a municipal corporation has, after the commencement of a street improvement and after the collection of a special assessment therefor, wholly abandoned such improvement, a person, whose property has not been benefited in any manner by the work already done, and who has, by judicial proceedings, been compelled to pay the full amount of his assessment, is entitled to recover from the city the amount paid by him, with interest, as upon a failure of consideration.

James E. Markham and Carl Taylor, for the appellant.

Ambrose Tighe and John W. Lane, for the respondent.

384 **BUCK, J.** In January, 1891, the defendant instituted proceedings for opening, widening, and extending East Third street, in the city of St. Paul, from White Bear avenue to the eastern boundary line of said city, a distance of one mile, across section 35, township 29, range 22, in Ramsey county, in this state. This property was then owned by one David J. Hennessy, who opposed such proceedings. The board of public works of said city confirmed the proceedings, and Hennessy appealed to the district court. On June 16, 1891, the common council of the defendant duly established the grade of said East Third street from Earl street to White Bear avenue, a distance of one mile and a half, and on September 22, 1891, established

the grade of said East Third street from White Bear avenue to the east city limits. This last-described grade of one mile so ordered was on the land of Hennessy; the city having given a bond of indemnity to him, in order that it might proceed with the condemnation of said land, and grade the same. Prior to the spring of 1891, East Third street had been graded as far east as Earl street. In March, 1892, the contract for the improvement was let at the price of forty-seven thousand dollars, and an assessment levied to cover it and the attendant expenses. About twenty-one thousand dollars of this assessment was levied on the Hennessy farm, and twenty-eight thousand dollars was divided among the lots fronting on the other mile and a half of street to be graded.

The plaintiff owned fourteen lots. One of the lots was assessed two hundred and one dollars; twelve, eighty dollars and fifty cents each; and one, seventy-six dollars and fifty cents. On August 24, 1892, the plaintiff paid twelve hundred and ninety-four dollars and forty-three cents into the city treasury, and the city ever since has had, and still has, his money. The work, as a consideration for which it was paid, was begun and continued at intervals until June, 1893. In 1893 the defendant city council passed the following resolution:

“Resolved, that all proceedings heretofore had for the opening, widening, and extension of East Third street from White Bear avenue to the east city limits be, and the same are hereby, in all things annulled, and that all proceedings had for the condemnation of an easement for slopes along the line of East Third street from White Bear avenue to the east city limits be, and the same are, in all things annulled. Resolved, further, that the corporation attorney be, and he is hereby, authorized to stipulate for judgment in the action pending in the United States circuit court, wherein David ³⁸⁵ J. Hennessy is the complainant and the city of St. Paul and Thomas Keough and Daniel Donnelly are defendants, that judgment be entered that the condemnation proceedings heretofore had for the opening of East Third street across section 35, town 29 north, range 23 west, be declared null and void, and the condemnation proceedings had for the acquiring of an easement for slopes across said section on the property abutting on the line of East Third street be also declared null and void, and that the assessment made against said section for the grading of East Third street be set aside and declared null and void, and that

the defendants in said suit have no right to enter or do any work upon said section under the contract heretofore entered into between the city of St. Paul and Thomas Keough and Daniel Donnelly; and the corporation attorney is also authorized to stipulate for proper judgment in the appeal cases of David J. Hennessy against the city of St. Paul from the confirmation of the assessments for the opening of East Third street, and also from the confirmation of the assessment for the acquiring of an easement for slopes along the line of East Third street."

Upon the trial the defendant also admitted that prior to October 1, 1893, the contract for doing the work of grading on East Third street from Earl street to the east city limits was rescinded by the city. In its answer the defendant says (referring to Hennessy's objection to the assessment upon his land) that "thereafter such proceedings were had in this court that an order and judgment were entered in said cause so appealed to this court by said Hennessy, in all things annulling the assessment as made by said board of public works, in so far as it related to said real estate designated as section 35 aforesaid."

The trial court found as a fact, "that the defendant has, through its said contractors, done some work on said street east of said Clarence street; but has never completed said street east of said point so that it is capable of being traversed either by teams or foot passengers; that in June, 1893, the defendant ceased entirely work on said street, wholly abandoned said projected improvement, and has never completed the same east of said Clarence street; that the plaintiff's said property is situated between Bock and Kennard streets, which are to the east of Clarence street, and that the nearest of plaintiff's said lots to Clarence street is about one-half mile east of said Clarence street; that between said Clarence street and the first of plaintiff's said lots next east thereof are two deep holes, and that access to plaintiff's property cannot be had over said Third street as the same has been left ³⁸⁶ by the defendant; that had said improvement been completed as projected, access to plaintiff's said property from the center of St. Paul and to the east city limits would have been secured therefrom, and said property would have been benefited thereby to the amount of the assessment imposed as aforesaid, to wit, in the sum of twelve hundred and thirty-three dollars and fifty cents (\$1,233.50); that the grading of said street to the extent

actually done is not, and at no time has been, of any benefit whatsoever to the plaintiff's said property; that the allegations of the pleadings, save as hereinbefore found, are not sustained by the evidence."

The court found as conclusion of law that plaintiff was entitled to recover from the defendant the sum of twelve hundred and ninety-four dollars and forty-three cents, and legal interest from August 24, 1892. From an order denying a motion for a new trial, the defendant appeals.

The defendant contends that the evidence does not sustain the finding of the trial court that the improvement of East Third street was abandoned by it. We are of the opinion that this contention is not well founded. There is no claim made in defendant's answer, and none was made on the trial, or on the argument in this court, that defendant wishes, desires, or ever intends to grade, widen, or improve said Earl street, or the proposed street over the Hennessy land. In fact, no substantial proceedings were ever instituted by the defendant with a view to further carrying on the original proceedings instituted in January, 1891. It is true the city council, after plaintiff had remonstrated with it on account of its delay in the matter, directed the board of public works to investigate the feasibility of completing the grading of East Third street, not from Clarence street to the east city limits, as contemplated by the original petition, but to White Bear avenue, which is a mile west of the east city limits, and even this proceeding was substantially abandoned; and the plaintiff, fearing that an action for his claim for the money so paid to the defendant would be barred by the statute of limitations, brought this action January 31, 1898.

The evidence is quite conclusive that the plaintiff's lots have not been benefited by the grading, or any acts done under the proceedings instituted by the city for such purpose. The city, by judicial proceedings, compelled him to pay to it the full amount of the ³⁸⁷ assessment; and, with commendable forbearance, he waited nearly six years for the city to complete its work after obtaining his money in August, 1892, which it keeps without the slightest evidence of its intent to complete its work of grading and improving the street named. If it intends to complete this work, it should do so or say so. We do not approve of a great and wealthy city remaining passive, inactive, and its officers silent, upon such matters of public concern, for so long a period, to the great injury of one of its

citizens, especially without signifying its intent to proceed with the projected improvement. He had a right to elect to have them act promptly, and determine whether they would abandon or not. Mills, in his work on Eminent Domain, 312, says that there should be no unreasonable delay in determining whether or not the proceedings shall be abandoned, and that the public must be held to a speedy and prompt termination of the proceedings. It is to be noted that this is not a case of attempting to condemn and appropriate land for city purposes where the city takes and keeps possession of the property, and has not paid the damages, and where possession would be evidence that it had not abandoned the undertaking.

It is evident that the undertaking was an unwise one, and the expense entirely beyond the resulting benefits to all the property involved; the delay of six years is prima facie evidence that the improvements were unnecessary, and doubtless justified the city in abandoning the work. Lewis, in his work on Eminent Domain, section 657, says: "In most of the cases which have arisen, the intention to abandon has been manifested by affirmative acts. But this intention may be manifested in other ways. Where a statute required the final order establishing a highway to be filed with the town clerk within ten days from its date, a failure to do so was held to constitute an abandonment of the proceedings. Where a motion to accept an award was made and lost in a county board, it was held to amount to a vote to abandon. The failure to pay the damages within a reasonable time after their final determination will itself constitute an abandonment of any right to take the property under the proceedings had. What will constitute a reasonable time must, of course, depend upon circumstances. Four years has been held to be an unreasonable delay, constituting an abandonment and in the ³⁸⁸ same case it is said that after one year, no offer to pay having been made, the assessment would become functus officio."

We are of the opinion that the facts in the case fully justify and sustain the findings of the trial court that the defendant city had abandoned the grading of East Third street as contemplated in the proceedings under which the assessment was made and levied, and that, as the plaintiff has received no benefit or consideration for the money paid by him to the city by coercion of law, he can maintain this action to recover it: *Valentine v. St. Paul*, 34 Minn. 446. This being so, it is not necessary for us to consider the question as to whether the

plaintiff has a remedy by mandamus to compel the board of public works to proceed with the improvement. If he had such a remedy, it was not an exclusive one.

The appellant claims that the rule laid down by this court in the case of *Strickland v. Stillwater*, 63 Minn. 43, is not applicable to the case at bar, or that, if it is, it should not be adhered to. In that case the city adopted a general plan for grading parts of the several streets, which included that part of a street in front of Strickland's lots, and extending beyond the same in each direction. The assessment included her property, and all other property benefited by such grading, although not abutting on the improvement. Part of the contemplated grading was done, but none in front of her property, and the street was graded nearly up to her property. The city abandoned doing any further work although she had paid the full amount of her assessment for making the entire improvement; and she sued the city for the sum so assessed and paid, and recovered judgment for the full amount, upon the ground that her property had been assessed upon the basis of frontage, and, no grading having been done on the street in front of her abutting property, she was entitled to recover the whole sum paid by her as benefits. This court held that this was error, but that as her property was so assessed, and it having been done in pursuance of a general plan which included an assessment upon all property benefited by such improvement within the limits of such plan, she might have been benefited by such grading done in part, although none of it was done directly in front of her property,³⁸⁰ and, if so, her property was liable for the amount of such benefit, whatever it might be, and that whatever sum she was entitled to receive, if any, would be the difference between the actual benefits added to her property by the grading as an entirety, so far as done, and the sum which she was compelled to pay to said city of Stillwater.

We think this rule a sound and equitable one, protecting the rights of the citizen, and imposing a duty upon the municipality to perform its obligations. The principle upon which that case rested is applicable to the one at bar; that case differing from this only in the fact that in the *Strickland* case the plaintiff received some benefit from the partial performance of the improvement, and in this the plaintiff received none. The counsel for the appellant contend that, if the rule in the *Strickland* case is to be adopted as the law of this state, some peculiar

situations will result. Any such conditions can be easily avoided by municipal corporations fully, completely, and honestly performing their duties and obligations, and not sheltering their defaults behind the plea of nonaccountability. The doctrine in the Strickland case is adhered to. Our conclusion is, that the plaintiff is entitled to recover in this action from the defendant city the amount so paid it by him, with interest, as upon failure of consideration.

Order affirmed.

CANTY, J., dissented, and said in part: "This action is brought upon the theory that when a special tax is levied on property specially benefited by an improvement, to defray the cost of making that improvement, and the money is spent in the improvement, but the city does not complete the same, and it turns out, in the light of subsequent events and subsequent experiences, that the improvement was an injudicious undertaking, the taxpayer can recover from the city the money thus injudiciously spent in the abortive enterprise. There is no difference in this respect between a special tax on property specially benefited and a general tax on all the property in the city or county. Each is levied by the same sovereign power. That power acts in its sovereign capacity, not in its private or contractual capacity, in levying such a tax, and, therefore, is not liable for the failure of the tax to bring any benefit to him who pays it. True, the special tax is levied on the supposition that the party paying it is benefited to an amount equal to the amount of the tax. But the question of whether he is or will be thus benefited is tried at the time the assessment is made, and cannot be subsequently reviewed in an action brought to recover the tax after it is paid, merely because the improvement was injudiciously undertaken. Of course, where the assessment district and the improvements are changed after the tax is levied and collected, so that one taxpayer has paid more than his share, he may recover the excess. . . . But here he is allowed to recover taxes collected and squandered in the construction of abortive improvements."

RECOVERY OF TAXES PAID TO A CITY.—As to what must be shown in order to maintain an action to recover taxes paid to a municipal corporation, see *First Nat. Bank of Americus v. Mayor*, 68 Ga. 119, 45 Am. Rep. 476.

MINNESOTA BUTTER AND CHEESE COMPANY v. ST.
PAUL COLD STORAGE WAREHOUSE COMPANY.

[75 MINNESOTA, 445.]

WAREHOUSEMAN—LIABILITY FOR NEGLIGENCE.—

Where a warehouseman receives cheese in wooden boxes in good condition, to keep in a dry room at thirty-two degrees temperature, and kept at such temperature by overhead pipes filled with brine, a receipt, stating that the property is kept at the owner's risk of any loss or damage from water, etc., does not relieve the warehouseman from liability for damage caused by the dripping of water from the overhead pipes resulting from his negligence in not giving them proper attention and care.

Clapp & Macartney, for the appellant.

Stevens, O'Brien, Cole & Albrecht, for the respondent.

⁴⁴⁶ BUCK, J. The plaintiff brought this action to recover of the defendant damages which it alleged it had suffered by reason of the negligent acts of the defendant in caring for a large quantity of cheese which plaintiff had consigned to the defendant to store and preserve for future sales. The cheese was delivered in wooden boxes, in good condition, and placed in defendant's warehouse, where it was to be ⁴⁴⁷ kept in a dry room at a temperature of about thirty-two degrees above zero, and kept at such low temperature by overhead pipes filled with brine. Upon the brinepipes ice and frost formed at a low temperature, but when the temperature rose in the room, as it did, this ice and frost melted, and dripped down upon the floor, and upon the cheese boxes, and thereby caused the cheese to become damp and moldy, and greatly deteriorate in value. The question of the defendant's negligence was submitted to the jury, and it found a verdict in favor of the plaintiff. The evidence upon this question fully warrants the verdict.

The legal question involved hinges upon the construction to be placed upon a receipt issued by the defendant, and sent to the plaintiff several days after some of the cheese was stored in defendant's warehouse. The receipt acknowledged that defendant had received at different times, on July 2d, 3d, and 7th, one hundred and thirty-nine boxes of cheese, to be delivered to plaintiff or order, on surrender of the order and payment of all charges. It further contained this provision:

"Conditions.

"All the property is to be at owner's risk of any loss or damage from riot, fire, water, deterioration, defective cooperage, packing, ratage, vermin, leakage, frost, or from being perishable or otherwise inherently defective when stored."

As the plaintiff received and kept this receipt, it was bound by its terms and conditions, but, as we construe the receipt, the defendant is not exempt from its own acts of negligence in caring for the cheese while in its warehouse and it was receiving a full consideration for caring for the same. In all bailments the nature and value of the property affects the question of ordinary care, and this degree of care is such as the generality of mankind use in their own affairs. This receipt was issued by the defendant, and it is using it for its own benefit, and, if it is ambiguous, it must be construed against itself; and we think that an exemption from a loss or damage through any particular cause will never be construed to cover a negligent loss of that character: *Lawson on Bailments*, sec. 162. This receipt does not in terms provide against the negligence of the defendant. The condition that all the property shall be at the owner's risk of any loss or damage from water might doubtless apply ⁴⁴⁸ to cases of a great flood, or a violent storm of rain, but not to dripping of water from the overhead pipes resulting from the defendant's negligence in not giving them proper attention and care. It was clearly the defendant's duty to see that such dripping did not injure the cheese left in its care for hire.

The jury found the defendant negligent in this respect, and, as this was in violation of its duty and obligation to the plaintiff, the order denying the defendant's motion for a new trial must be affirmed, as we find no reversible errors.

So ordered.

ON THE LIABILITY OF WAREHOUSEMEN for negligence in storing perishable goods, see *Parker v. Union Ice etc. Co.*, 59 Kan. 626, 68 Am. St. Rep. 383. As to their liability in general, see the monographic note to *Schmidt v. Blood*, 24 Am. Dec. 145-160.

CONTRACTS EXEMPTING FROM LIABILITY FOR NEGLIGENCE are not favored by the law, and in all cases should be construed strictly, with every intendment against the party seeking their protection: *Crew v. Bradstreet Company*, 134 Pa. St. 161, 19 Am. St. Rep. 681.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

WINN v. RILEY.

[151 MISSOURI, 61.]

HUSBAND AND WIFE—RETROACTIVE EFFECT OF STATUTES RESPECTING.—Under the married woman's act of Missouri, passed in 1875, a husband, though married to his wife before the passage of that act, has no vested interest in personal property acquired by her subsequently to that date, and has no power to appropriate it to his own use without her consent in writing. Hence, if he appropriates advancements made to his wife by her father, without such consent, she may treat him as a trustee, or as a debtor, and recover the amount from his administrator after his death.

E. C. Hall, Joel Funkhouser, and M. B. Riley, for the appellants.

Thomas W. Walker and Turney & Goodrich, for the respondent.

64 **BRACE, J.** This is an appeal from a judgment of the circuit court of Clinton county, allowing a demand for \$7,814.53 in favor of the plaintiff, Julia A. Winn, widow of James N. Winn, deceased, against his estate, on appeal from the probate court of said county.

The demand allowed is as follows:

“The estate of James N. Winn, deceased, to Julia A. Winn, Dr.

“To cash received by deceased at the times and in the sums following, the same being the separate estate of plaintiff, to wit:

May 15, 1875, to cash.....	\$ 200.00
May 15, 1875, to cash.....	400.00
Feb. 28, 1877, to cash paid in part satisfaction of note owing by deceased to George P. Dorris, at request of deceased.....	1,000.00
March 1, 1878, to cash paid on said note at request of deceased.....	830.00
March 1, 1879, to cash paid on said note at request of deceased.....	830.00
July, 1881, to cash.....	500.00
May, 1883, to cash.....	1,500.00
April 9, 1888, to cash and land converted into cash by deceased.....	1,919.53
May 1, 1894, to cash.....	1,000.00
Total debit.....	\$8,179.53

Same, Cr.

May 15, 1875, by furniture.....	200.00
May 1, 1894, by carriage.....	165.00
Total credit.....	365.00
Balance due plaintiff.....	\$7,814.53"

The evidence tended to prove, and under proper instructions the jury found, that the several items of money charged in the demand were given to the said Julia A. Winn at the ⁶⁵ dates therein stated by her father, Berryman Shaver, and charged to her by him as advancements. That they came into the hands of her husband and were used by him in his business.

The several objections urged to the judgment may be answered without setting them out specifically.

The married woman's act of 1875 went into effect on the 24th of March, 1875: Laws 1875, p. 61. The plaintiff and the deceased were married prior to that date. Prior to the passage of this act, the husband by the marriage, acquired title to the personal property of the wife in possession, and the right to reduce to his possession for his own use and benefit her choses in action. In *Hart v. Leete*, 104 Mo. 315, it was held that the right of the husband to so reduce his wife's choses in action into his possession was not a vested right and that the act of 1875 applied to all cases where the husband

had not theretofore possessed himself of his wife's personal property. In the subsequent case of *Leete v. State Bank of St. Louis*, 115 Mo. 184, this ruling was disapproved, and it was therein held that the husband's right to acquire title for himself to the wife's property by reducing it to his possession was a vested right of which the act of 1875 could not and did not deprive him. Consequently, that as to such right acquired by a marriage prior to its passage that act did not apply. In the able and exhaustive opinion of Sherwood, J., delivered in that case, the language of Edwards, J., in *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160, is quoted with approval, aptly and tersely stating the principle as follows: "A right to reduce a chose in action to possession is one thing, and a right to the property which is the result of the process by which the chose in action has been reduced to possession, is another and a different thing. But they are both equally vested rights. The one is a vested right to obtain the thing, with the certainty of obtaining it by resorting to the necessary ⁶⁶ proceedings, unless there be a legal defense, and the other is a vested right to the thing after it has been obtained." Or, to state the proposition still more tersely, the vested right of the husband is a vested right quoad a thing in which the wife has a vested right. But if the thing had no existence at the marriage, the wife had no right in, and the husband could acquire no right quoad the thing by the marriage. Both her rights in and his rights as to the thing must be governed by the law in force at the time the subject of the action comes into existence, for then the rights of both first accrue. In consonance with this reasoning in that case, where the right of the wife to the property was vested in her by the will of her father in 1870, and the husband's right by the marriage vested in him in 1871, it was held that his marital rights to the property were not affected by the act of 1875. So, this case, in which the property in question, the gifts to the wife (the plaintiff) from her father, not in existence at the time of the marriage and as to which neither she nor her husband then had any rights whatever or thereafter until after the act of 1875 (Rev. Stats. 1879, sec. 3296; Rev. Stats. 1889, sec. 6869) went into effect, must be governed by that act, under which the rights of both did first accrue, as was ruled in *Columbia Sav. Bank v. Winn*, 132 Mo. 80, a case "on all fours" with the one in hand, on this question.

Under this statute the husband had no power to appropriate these gifts to his own use without her consent in writing: *Jones v. Elkins*, 143 Mo. 647; *Alkire Grocer Co. v. Ballenger*, 137 Mo. 369; *Columbia Sav. Bank v. Winn*, 132 Mo. 80; *Hoffmann v. Hoffmann*, 126 Mo. 486; *McGuire v. Allen*, 108 Mo. 403; *Gilliland v. Gilliland*, 96 Mo. 522; *Broughton v. Brand*, 94 Mo. 169. No such consent was shown, or given, and the money which came by these gifts of her father to the plaintiff was her separate property, was not transferred to her husband by his use thereof, and was a trust fund in his hands for her benefit while in his use and possession: *Alkire Grocer Co. v. Ballenger*, 137 Mo. 369; *Columbia Sav. Bank v. Winn*, 132 Mo. 80; *Hoffmann v. Hoffmann*, 126 Mo. 486.

As to such fund she could treat her husband either as a trustee or simply as a debtor: *Hoffmann v. Hoffmann*, 126 Mo. 486; *Columbia Sav. Bank v. Winn*, 132 Mo. 80; *Alkire Grocer Co. v. Ballenger*, 137 Mo. 369. By electing to treat him as a debtor, the indebtedness, although growing out of this trust relationship, became a money demand against his estate over which the probate court had jurisdiction: *Hoffmann v. Hoffmann*, 126 Mo. 486; *Church v. Church*, 73 Mo. App. 421; *Todd v. Terry*, 26 Mo. App. 598. There is no place in this case for the application of any of the statutes of limitation.

The judgment of the circuit court is affirmed.

All concur.

HUSBAND'S STATUS AS TO WIFE'S SEPARATE PERSONAL PROPERTY.—At common law, marriage vests in the husband the personalty of his wife then owned or thereafter acquired by her, and of which he obtains possession: *Botts v. Gooch*, 97 Mo. 88, 10 Am. St. Rep. 286; but, in some of the states, the statute abrogates a husband's marital right to his wife's choses in action: *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160; and a husband cannot acquire an interest in his wife's separate estate by any independent act of his: *Lewis v. Johns*, 24 Cal. 98, 85 Am. Dec. 49. If he receives and keeps money belonging to her, he is her trustee: *Note to Sykes v. City Sav. Bank*, 69 Am. St. Rep. 566; *Bergey's Appeal*, 60 Pa. St. 408, 100 Am. Dec. 578.

SPRINGFIELD STEAM LAUNDRY COMPANY v. TRADERS' INSURANCE COMPANY.

[151 MISSOURI, 90.]

INSURANCE — COMMENCEMENT OF FORECLOSURE PROCEEDINGS—WHAT IS.—The advertisement of mortgaged property for sale, as provided by the mortgage, is the commencement of foreclosure proceedings, within the meaning of a policy of insurance which provides that it shall be absolutely void upon the commencement of proceedings for the foreclosure of the mortgage.

INSURANCE—FORFEITURE BY COMMENCEMENT OF FORECLOSURE PROCEEDINGS.—If a policy of insurance upon mortgaged property expressly provides that it shall become absolutely void upon the commencement of proceedings for the foreclosure of the mortgage, without the written consent of the insurance company, and the mortgage, by its terms, is subject to foreclosure, if the taxes on the mortgaged property are permitted to become delinquent, the policy becomes void, when the property is advertised for sale on account of such default, unless the breach is waived.

INSURANCE—FORFEITURE—POWER OF LOCAL AGENT TO WAIVE.—A local agent of an insurance company, who has power to make contracts of insurance in the name of the company, to issue policies, to receive premiums therefor, and who is clothed with all the authority of his principal with respect to such matters, has power to waive a condition of the policy. Hence, if a policy upon mortgaged property provides that it shall become absolutely void upon the commencement of proceedings for the foreclosure of the mortgage, without the written consent of the company, and the property is advertised for sale, under the terms of the mortgage, because of the nonpayment of taxes, there is a forfeiture of the policy, but if the local agent, being advised of the advertisement for such sale, takes no action toward a cancellation of the policy, his conduct amounts to a waiver of the forfeiture, although the policy declares that the company's secretary alone can waive conditions therein.

Heffernan & Heffernan, for the appellants.

Fyke, Yates & Fyke, for the respondent.

BURGESS, J. This is an action upon a policy of fire insurance. At the time the policy was issued the property was mortgaged, and the policy provided that any loss should be paid to the mortgagee. The defense was, that prior to the destruction of the property the conditions of the mortgage were violated and the property advertised for sale thereunder, and that by reason thereof the policy was invalidated and void at the time it was consumed by fire.

The cause was submitted to the court on an agreed statement of facts. The trial resulted in a judgment for defendant. From this judgment plaintiffs appealed to the St. Louis

court of appeals, where the judgment was affirmed, but, because of the dissent by one of the judges of that court from the opinion therein rendered, upon the ground of the opinion being in conflict with former decisions of this court, the case was certified to the supreme court.

The facts agreed upon are substantially as follows: The property was owned by the Springfield Steam Laundry Company. The insurance was taken out by it, and by the terms of the policy the loss, in case of the destruction of the property, was to be paid to the mortgagee as his interest might appear. After the loss the claim was assigned by the mortgagee to the plaintiff Heffernan. The mortgage, by its terms, was subject to foreclosure if the taxes on the mortgaged property were permitted to become delinquent. This condition of the mortgage was broken, and by reason of it the trustee ⁹⁴ advertised the property for sale as provided by the terms of the mortgage. The sale was enjoined. Subsequently the taxes were paid and the injunction proceedings dismissed. A short time thereafter the fire occurred. The policy contained this provision, to wit: "If the property be sold, transferred, or is or becomes encumbered by mortgage or trust deed, or by judgment, tax, or mechanic's lien, or upon the commencement of proceedings for its foreclosure or sale, or levy thereon by a law officer, or upon its passing into the hands of a receiver or trustee, or if this policy be assigned before a loss, then, and in every such case, this policy shall, without the written consent of this company thereto be indorsed hereon, become absolutely void." Another condition of the policy is as follows: "It is further understood and agreed, and made a part of this contract, that neither the agent who issued this policy, nor any other person, except its secretary in the city of Chicago, has authority to waive, modify, or strike from the policy any of its terms and conditions, . . . nor, in the event that this policy shall become void by reason of noncompliance with any of its terms or conditions thereof, shall the agent have power to waive, modify, or revive the same, and any policy so made void shall remain void and of no effect, any contract by parol or otherwise or understanding with the agent to the contrary notwithstanding." It was further agreed that the local agent of the defendant, who issued the policy, had notice of the advertisement of the property for sale and the subsequent proceedings in reference thereto.

The court of its own motion declared the law to be that under the law and agreed statement of facts the plaintiff is not entitled to recover.

The first question for consideration is as to whether or not the advertisement of the property for sale under the deed of trust was the commencement of foreclosure proceedings within the meaning of the terms of the policy; if so, by one of its express provisions the policy became void and of no effect.

⁹⁵ The case of *Michigan Ins. Co. v. Lewis*, 30 Mich. 41, was an action upon a policy of fire insurance in which it was provided that "in case of any transfer or termination of the interest of the insured, or any part of his interest, in the property hereby insured, either by sale, contract, or otherwise, or in case any mortgage, lien, or encumbrance shall be executed thereon, or shall attach thereto, or if the title thereto shall be in any way changed or affected after the date of this policy, or if any proceedings for sale thereof shall be had, commenced, or taken, or if the title thereto shall be or become less than an absolute and perfect one, without such consent, this policy shall from thenceforth be void and of none effect." In that case, as in the case at bar, the only steps taken toward a foreclosure of the mortgage was to advertise the property for sale, in accordance with its provisions, and the supreme court, in its opinion, in passing upon the question as to whether or not the advertisement of the property for sale was a "proceeding for sale" within the meaning of the policy, said: "The words seem to us to be satisfied by confining them to the actual offer of the premises for sale at the time specified in the notice. In strictness, it may be said that such an offer is the first proceeding for a sale; the previous notice is only a step which is to put it in the power of the mortgagee to make a sale at the time fixed upon if payment shall not sooner be made. The notice, in a certain sense, is undoubtedly a proceeding for a sale, and so would be the commencement of a suit in equity; either proceeding may possibly result in a sale; but while either method of foreclosure is in progress, and before the right to make a sale has been reached, it is in substance rather a proceeding for the collection of the mortgage moneys than a proceeding for a sale. And it can never be known until the day fixed in the notice shall arrive without actual payment being made that a sale can take place at all."

While we are fully satisfied that the rule announced in that case, as we understand it, and which is applicable to this, ⁹⁶ that is, that the advertisement of the property for sale under the mortgage was a commencement of proceedings for its foreclosure, or sale of the mortgaged property within the mean-

ing of the policy, was a breach of its conditions and rendered it invalid unless the breach was waived, yet, when the facts that the amount of taxes due upon the property was so small as compared with its value, that the sale was enjoined and the taxes paid, and the proceedings to sell finally abandoned, are considered, we should not be inclined to hold the policy forfeited, because it would be most unreasonable and unjust to do so, if it were not for the fact that it was expressly provided in the policy that it should become absolutely void upon the commencement of proceedings for the foreclosure of the mortgage. The proceedings were commenced in consequence of the failure of the assured to pay the taxes on the property according to the terms of the agreement, and this court has no power in the absence of fraud or mistake to relieve plaintiff from the obligations of its contract. If parties will make such contracts they have no right to expect courts to disregard the law in construing them. Such provisions are not, however, infrequent.

Titus v. Glens Falls Ins. Co., 81 N. Y. 410, was an action upon a fire insurance policy containing a condition declaring it void in case foreclosure proceedings were commenced against the mortgaged property on a mortgage covering it, which were prosecuted to judgment. Held, that the foreclosure proceedings forfeited the policy. The court said: "A provision that a policy shall be void in the case of foreclosure proceedings is common in insurance policies, and we must assume that experience has shown to underwriters that such proceedings increase the risk to the insurer. The defendant might have been willing, for the premium charged, to insure this barn with the mortgage upon it, and yet not willing to insure it in case of proceeding to foreclose the mortgage. It did assent to the mortgage, and agree that the loss, ^{or} if any, be paid to the mortgagee, but it did not assent to continue the insurance in case the risk was increased by proceedings to foreclose the mortgage. Before commencing the foreclosure the plaintiff should have obtained the assent of the defendant. It might have examined the circumstances and granted such assent without any conditions, or it might have required an additional premium for the increased risk. It might have refused altogether, and in that case the plaintiff could have delayed his foreclosure until the end of the year, or surrendered the policy and procured insurance elsewhere. Even if the provision were found to be very inconvenient and embarrassing, there is no help for

it. There it is, and we cannot take it out of the policy by construction. There are two provisions: One, that liens, without the assent of the company, shall avoid the policy; and another, that foreclosure proceedings shall avoid it; and effect must be given to both. According to the construction contended for on the part of the plaintiff, the latter provision would be wholly useless or nullified in every case, because all liens avoid the policy unless assented to; and according to that construction, when assented to, foreclosure proceedings may be instituted without avoiding the policy. If such proceedings may be instituted as incident to the mortgage, then they may be carried to their conclusion by a sale and conveyance, and thus, by assenting to a mortgage, a company may be held to have assented to a change of title of the insured property. Such a construction is unreasonable and unwarranted."

The case of the Merchants' Ins. Co. v. Brown, 77 Md. 79, was a suit on an insurance policy which contained a clause making the policy void "if, with knowledge of the insured, foreclosure proceedings be commenced, or notice be given of sale of any property covered by this policy, by virtue of any mortgage or trust deed." The property was advertised and sold under the provisions of the mortgage, and ⁹⁸ in an action on the policy it was held that the advertisement of the mortgaged property for sale, as provided by the mortgage, was the commencement of foreclosure proceedings within the meaning of the policy, and rendered it void.

But it is claimed that even if the policy was forfeited, the forfeiture was waived by defendant's local agent. The evidence showed that the agent had power to issue policies, that he was advised of the advertisement of the property for sale under the mortgage, and that he took no action toward the cancellation of the policy.

Defendant's agent was authorized to make contracts of insurance in the name of his principal and to issue policies, and receive premiums therefor, and was clothed with all the authority of his principal with respect thereto, and the question is whether, under such general power, he was authorized to waive a forfeiture of the policy under the restrictions and limitations therein contained.

Upon this question the authorities are in great conflict, the trend of the more recent being in favor of the power of a general agent to waive a forfeiture notwithstanding the policy provides that only a certain person can waive it.

The question was before the supreme court in the recent case of *James v. Mutual Reserve Fund Life Assn.*, 148 Mo. 12, which was an action upon a policy that expressly provided that "no contract, alteration, or discharge of contract, waiver of forfeitures nor granting of permits or credits shall be valid unless the same shall be in writing, signed by the president or vice-president and one other officer of the association," and it was held that the agent of the company might waive a forfeiture for nonpayment of a premium, though the policy expressly stated that no waiver should be valid unless in writing, signed by an officer of the company: *Parsons v. Knoxville Fire Ins. Co.*, 132 Mo. 583.

In treating of this subject in 1 *Joyce on Insurance*, section 439, it is said: "We deduce, however, the rule that the tendency of the weight of authority at the present day is ⁹⁹ against making restrictions in the policy upon an agent's authority conclusive upon the assured, and that the company, or any agent with general or unlimited powers, clothed with an actual or apparent authorization, may either orally, or in writing, waive any written or printed condition in the policy, notwithstanding such restrictions, and many cases apply this rule, even though the policy provides that a distinct specific agreement shall be indorsed thereon, or otherwise prescribes a particular mode of waiver or that only certain persons can waive, and there would be no valid reason why if the agent may waive the restriction in the first case he may not in the latter, for such restrictions are declared to be ineffectual to limit the legal capacity of the company to bind itself by waiving conditions of the policy through an agent acting within the real or apparent scope of his authority": *Weed v. Lancashire Fire Ins. Co.*, 116 N. Y. 117.

It is now well settled in this state that a general agent of an insurance company may waive proofs of loss, as well as forfeitures or policies obtained by means of false representations as to the condition of the property insured or for the nonpayment of premiums, notwithstanding it is expressly provided in the policy that only certain persons can waive such things (*Nickell v. Phoenix Ins. Co.*, 144 Mo. 420, and authorities cited), and we can see no reason why the same rule should not apply in case of forfeiture of the policy for any other violation of its provisions.

As the views we have expressed are not in accordance with the rulings in *Jenkins v. German Ins. Co.*, 58 Mo. App. 210,

and Shoup v. Insurance Co., 51 Mo. App. 286, those cases should not longer be followed.

For these considerations we reverse the judgment of the court of appeals and remand the cause to that court, with directions to enter up judgment reversing the judgment of the circuit court and remanding the cause to that court for further trial.

Gantt, P. J., and Sherwood, J., concur.

INSURANCE—COMMENCEMENT OF FORECLOSURE PROCEEDINGS—FORFEITURE.—If a policy of insurance is, according to its terms, to become void upon the commencement, with the knowledge of the insured, of foreclosure proceedings, or notice given of the sale of any property covered by the policy, by authority of any mortgage or deed of trust, it is sufficient that notice of the sale has been given, or foreclosure proceedings otherwise commenced, with the knowledge of the insured: Note to Horton v. Home Ins. Co., 122 N. C. 498, 65 Am. St. Rep. 724.

INSURANCE—WAIVER OF FORFEITURES BY LOCAL AGENTS.—Conditions in a policy of insurance working a forfeiture may be waived by the insurer, and such waiver may be presumed from the acts of the local agent. Hence, if a policy is to become void where foreclosure proceedings are commenced, or notice is given of the sale of any property covered by the policy, by virtue of any mortgage or trust deed, and the property insured is advertised for sale under a trust deed before the fire and loss, such breach of the condition is waived where the insurer's agent saw the advertisement and there were no steps taken to cancel the policy: Horton v. Home Ins. Co., 122 N. C. 498, 65 Am. St. Rep. 717.

NATIONAL BANK OF COMMERCE v. AMERICAN EXCHANGE BANK.

[151 MISSOURI, 320.]

TRIAL—DEMURRER TO EVIDENCE.—A plaintiff is entitled to have drawn from the evidence adduced every reasonable intendment in his favor. Hence, if, from all the facts disclosed, there is any substantial evidence tending to show that he is entitled to recover upon the whole case, it should be submitted to the jury, but, if either one of the defenses set up by a defendant is a good defense to the plaintiff's action, and is sustained by evidence, which is all one way, and with respect to which there is no conflict, it is proper for the court to declare the law to be that the plaintiff is not, under the pleadings and evidence, entitled to recover.

BANKS—COLLECTIONS, WHAT MAY BE.—A bank authorized to collect a draft for another bank has no implied power to receive anything except money in payment. Hence, if it accepts a check, it assumes the risk of its payment, though it has put it in the clearing-house for collection, and is answerable to the bank sending the draft for the amount of the check with interest from the date of its receipt.

BANKS—COLLECTIONS—RECEIVING CHECK AS PAYMENT.—When a bank, authorized to collect a draft for another bank, accepts a check in payment and surrenders the draft, it makes the check its own, and its liability to the bank in whose favor the draft was drawn becomes fixed as much as if it had received cash instead of the check.

BANKS — COLLECTIONS — RECEIVING WORTHLESS CHECK AS PAYMENT—RECOVERY OF REMITTANCE—CUSTOM—LOSS—MISTAKE.—If a bank, authorized to collect a draft for another bank, accepts a check in payment, and remits the amount of the draft to the bank which sent it, supposing the check to be good and that it would be paid upon presentation in the usual course of business, but sues its principal for the amount of the remittance, after finding out that the check is worthless, it is no ground for recovery that the transaction was in accordance with the usual and customary way of doing such business, or that neither the bank sending the draft nor the one in whose favor it was drawn sustained any damage by the acceptance of the check; or that the collecting bank received the check and paid the draft by mistake as to the solvency of the drawer of the check, and his ability to pay it.

BANKS—COLLECTIONS—CHECK AS PAYMENT—RECOVERY OF REMITTANCE BECAUSE OF MISTAKE OF FACT.—When a bank, authorized to collect a draft for another bank, accepts a check in payment, its mistake as to the solvency of the drawer of the check and his ability to pay it is not such a mistake of fact as will entitle the collecting bank to recover the amount of a remittance made by it in payment of the draft.

Elijah Robinson, for the appellant.

Thomas E. Ralston, for the respondent.

324 **BURGESS, J.** This is an action to recover the sum of nine thousand dollars, the amount of a draft sent by the Hide and Leather National Bank of New York, to the defendant at St. Louis for collection, and by it forwarded to plaintiff at Kansas City, Missouri, for collection and return. The action is predicated upon the alleged justifiably mistaken belief with respect to the solvency of the drawee, one Frank E. Tyler, who was doing business under the name of Benjamin McLean & Co., and therefore took his check on another bank for the draft, and delivered the draft to him, and on the same day sent its draft to defendant for the amount, supposing the check to be good and that it would be paid on presentation in the usual course of business. But the check proved to be worthless. The case was tried by the court, a jury being waived. There was a judgment for defendant, and plaintiff appeals.

For several years prior to April 21, 1893, Frank E. Tyler had been doing business in Kansas City, New York, and ³²⁵ a number of other places under the name of Benjamin McLean & Co. On the seventeenth day of April, 1893, his New York represent-

ative in the name of Benjamin McLean & Co., drew a draft upon him in favor of the Hide and Leather National Bank of that city for nine thousand dollars on Benj. McLean & Co., Kansas City, Missouri, which was on the same day delivered to the Hide and Leather National Bank, and by it placed to the credit of the drawers. On the same day that the Hide and Leather National Bank received said draft, it forwarded it, together with some other collections, to its correspondent, the defendant bank, for collection, at the same time, according to its custom, charging the same to defendant, which upon their receipt by defendant were credited to the Hide and Leather National Bank. The defendant received the draft on the nineteenth day of April, 1893, and on the same day sent it by mail to the plaintiff, for collection, by whom it was received at the opening of the bank for business on the following morning.

Tyler's place of business was at Armourdale, Kansas, some five or six miles from the National Bank of Commerce, and upon receipt of the draft the plaintiff bank informed him by telephone that it held it for collection, whereupon Tyler promised to send over and pay the same. This was the customary way of making collections from Tyler. But in this instance there was evidence upon the part of the defendant which tended to show that the draft upon Tyler was accompanied by a letter from it containing the following, to wit: "Caution. Protest all paper and deliver no bills of lading without payment of draft unless otherwise instructed. Wire nonpayment items over five hundred dollars. Return promptly all unpaid items." Upon the part of plaintiff, however, there was evidence tending to show that this letter was never received by it.

At the same time plaintiff received the draft in question from the defendant, it also received from the St. Louis ³²⁶ National Bank, for collection, another draft on Tyler for twelve hundred and eighty-three dollars and twenty cents, to which there was a bill of lading attached.

About 3:30 o'clock in the afternoon of the day upon which Tyler was notified by plaintiff that it had the nine thousand dollar draft for collection, he sent to plaintiff his check on the Metropolitan National Bank of Kansas City, for the amount of both of said drafts; and, upon the receipt thereof, the plaintiff surrendered to him both of said drafts, and the said bill of lading, and remitted to defendant the amount of the nine thousand dollar draft. At that time Tyler's financial standing seems to have been unquestioned.

When Tyler's check was received by plaintiff it was after banking hours, but the next day, the 21st, it was placed in the clearing-house for collection. The taking of the check, and placing the same in the clearing-house the next day for collection, seems to have been in accordance with the prevailing custom among the banks of Kansas City in regard to such collections. The Metropolitan Bank refused payment of the check, of which the plaintiff was notified about 3 o'clock in the afternoon of the 21st, and that evening plaintiff's assistant cashier notified defendant by wire of its nonpayment, and requested it not to remit the amount to the Hide and Leather National Bank, but the telegram was not received by defendant until the morning of the 22d, when defendant wired the Hide and Leather National Bank that plaintiff claimed to have remitted through mistake, and asked it to cancel the charge made against defendant's account, which it refused to do.

Tyler was indebted to said Hide and Leather National Bank, on a note in the sum of ten thousand dollars, which was independent of this nine thousand dollar transaction, and on the 24th of April it began suit against him in New York on said note, and attached everything he had in that state, and realized out of the attached property about seven thousand dollars.

³²⁷ In the evening of the 21st, Mr. Schwitzgeble, plaintiff's assistant cashier, caused a suit to be brought against Tyler in the district court of Kansas City, Kansas, and a writ of attachment to be issued, which was levied on some property supposed to belong to him. There was never any personal service, but he was notified by publication, and, on July 12, 1896, judgment by default was entered in this case. The property levied on under the writ of attachment in this case was covered by a prior lien, a mortgage, for a great deal more than its value (and also by a prior attachment in favor of the Metropolitan National Bank), and nothing was ever realized out of this suit.

On the morning of the 22d of April the plaintiff wired to several different places where Tyler was supposed to have property, directing the bringing of attachment suits. A small quantity of property was found and levied upon at El Paso, Texas, and also at Albuquerque, New Mexico, but soon thereafter an agreement was made between plaintiff and Tyler whereby the proceeds of this property, less expenses, were turned over to plaintiff and applied to reimbursing it for amount paid on the said twelve hundred and eighty-three dollars and twenty cents draft to which the bill of lading was attached, and was

not fully sufficient for that purpose. Thereupon all attachment suits were to be dismissed, and all were dismissed, except that at Kansas City, Kansas, which, through some oversight, was not dismissed. Plaintiff supposed it had been dismissed.

At the time of the institution of these suits, and for a long time thereafter, the plaintiff had no knowledge as to the actual facts connected with said nine thousand dollar draft, not knowing the circumstances under which the same was taken by said Hide and Leather National Bank, or whether said bank had paid out anything on the faith of the remittance by plaintiff to defendant. Soon after the institution of these suits, plaintiff wrote to defendant that it would look to it for said nine thousand dollars, but that it believed the money might be collected from Tyler by prosecution ³²⁸ of these suits, and regarded it more just that Tyler's property should pay it than that either of the banks should lose it, and that, unless defendant informed it to the contrary, plaintiff would take it for granted that it was understood between it and defendant that it should treat the claim as its own and make an effort to collect the money, and that by doing so it should not waive any of the rights as between it and defendant.

To the letters containing these statements Walker Hill, defendant's cashier, replied by letter of date April 29, 1893, "I wired New York on Monday, if possible withhold credit, but they declined to release us if we had proceeds of items in our hands. . . . I will say to you and your attorney in the most emphatic language that any suits you may bring to get your money back from McLean will be at your cost and risk, as this bank denies any liability, legally, morally, or any other way."

Neither the defendant nor the Hide and Leather National Bank sustained any damage or lost any remedy against, or recourse upon said Tyler or his property, or anyone else, by reason of anything done by plaintiff concerning said draft. Tyler was hopelessly insolvent, and the said Hide and Leather Bank levied upon, and subjected to the payment of another claim, all the property he owned, except the small quantity the proceeds of which were received by plaintiff as before stated.

This action was begun on the seventeenth day of March, 1894, and thereafter plaintiff took depositions and ascertained the facts above stated as to the connection of said Hide and Leather National Bank with said nine thousand dollar draft, the suit by said bank against said Tyler.

At the close of all the evidence the court declared the law to be that, under the pleadings, and all the evidence in the action, the plaintiff could not recover, and, in accordance therewith, rendered judgment for defendant.

³²⁹ 1. In passing upon the action of the court in declaring the law to be that, under the pleadings and evidence, plaintiff was not entitled to recover, every reasonable intendment in favor of the plaintiff is to be drawn from the evidence adduced, and if, from all the facts disclosed, there was any substantial evidence tending to show that plaintiff was entitled to recover upon the whole case, it should have been submitted. But, upon the other hand, if either one of the defenses set up by defendant was a good defense to plaintiff's action, and was sustained by the evidence, which was all one way, and with respect to which there was no conflict, then the law was properly declared.

With these legal principles in view, was plaintiff guilty of negligence in its manner of handling the collection of the draft in question? Plaintiff contends that it was not, and that in taking from Tyler his check on the Metropolitan Bank, and in putting it in the clearing-house for collection, it did all that it was legally required to do, that being the usual and customary way of transacting such business.

In 1 Morse on Banks and Banking, third edition, section 252, it is said: "If the bank takes the check of the party who is bound to pay the paper, and thereupon surrenders the paper to him, it assumes the responsibility for the check proving good. If it is not paid, the bank is still obliged to pay the amount to the person from whom it received the paper": *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343. The general rule is, that an agent, being authorized to receive money only, has no implied power to receive a check, or anything else except money, in payment, and, if he does so, he assumes the risk of its payment, and becomes liable to his principal for the amount of the check with interest from the date of its receipt by him: *Essex County Nat. Bank v. Bank of Montreal*, 7 Biss. 193. In such circumstances the law will presume damages to the principal and dispenses with proof thereof: 1 Daniel on Negotiable Instruments, 4th ed., sec. 335. Later on the same author ³³⁰ says: "In the United States it is quite certain that a banker or other agent, holding a bill or note for collection, would act at his peril in delivering it up on a receipt of a check for the amount; and that of the debtor did not pay the amount in money, and drawer or indorsers were not duly notified, they would be discharged, and

the loss would fall upon the collecting agent. . . . This seems to us the correct doctrine, for the agent exceeds authority in taking the check, and therefore acts at his peril. And while it may be, and as a general rule undoubtedly is, the practice of creditors, in mercantile communities, to take checks in the collection of debts, and frequently to surrender other instruments on receiving them, such a practice, on the part of the principal, falls far short of a usage which would permit the agent to do likewise": 2 Daniel on Negotiable Instruments, sec. 1625.

When plaintiff bank received Tyler's check on another bank in payment of the draft of the Hide and Leather Bank on him, and surrendered to him the draft, it made the check its own and its liability to the Hide and Leather Bank became fixed, as much so as if it had received the cash: Fifth Nat. Bank v. Ashworth, 123 Pa. St. 212; Commercial Bank v. Union Bank, 11 N. Y. 203.

It is true that it is said in 1 Morse on Banks and Banking, section 252: "But if the bank can show that it has conducted itself in the transaction in strict accordance with the customary and established mode of transacting such business, it seems that this might suffice to acquit it of all responsibility for any mishap. For it has been held in England that a banker who gave up bills indorsed to him for collection, upon receiving the acceptor's check, which was subsequently dishonored, could not be charged with negligence because the transaction was not an unusual one. It may be doubted whether it would free a banker from liability if he should simply show a frequent habit of parting with paper upon receiving the check of the debtor; or whether he would not have to go further, ³³¹ and show positively that it was understood in all such transactions that the banker discharged his full duty to his customer by so doing. Otherwise, the usage might amount only to a usage of bankers to assume a liability to their customers in such cases." But it must be apparent to anyone reading the language quoted that the author was not entirely satisfied with the position therein assumed, as the only authority cited in support thereof is Russel v. Hankey, 6 Term Rep. 9, and, besides, it is not in harmony with what is previously said in the same section.

That plaintiff at first regarded the check as its own, and so treated it, is evidenced by the several attachment suits instituted by it against Tyler on the check, and its communication with defendant, both verbal and written, with respect thereto.

It is true that shortly after the institution of the attachment suits, but not until then, plaintiff wrote to defendant that it would look to it for said nine thousand dollars, but that it believed the money might be collected from Tyler by prosecution of these suits, and that, unless defendant informed it to the contrary, plaintiff would take it for granted that it was understood between it and defendant that it should treat the claim as its own, and make an effort to collect the money, and that by doing so it should not waive any of its rights as between it and defendant; but defendant replied that any suits that plaintiff might bring to get its money back would be at its own cost and risk, and denying all liability upon its part. It doesn't look reasonable, nor are we disposed to believe, that plaintiff would have pursued this extraordinary remedy in order to collect a debt which it did not regard as its own, and that it would have continued its pursuit, especially after having been notified by defendant that, if it did so, it would be at its own cost and risk.

Whatever the usage may be with respect to the surrender of an obligation for the payment of money to the obligor by the owner thereof upon the receipt of a check given for its payment, as between an agent of the principal and the ³³² principal's debtor it has no application in this case: *Hall v. Storrs*, 7 Wis. 253. For under such circumstances such a usage or custom would be unreasonable and could not be invoked as a justification for such a course: *Whitney v. Esson*, 99 Mass. 308, 96 Am. Dec. 762.

2. But plaintiff contends that neither the defendant bank nor the Hide and Leather Bank sustained any damage whatever by reason of the course pursued by plaintiff, and therefore plaintiff is entitled to recover the money from defendant regardless of the question as to whether it was negligent in handling the collection of the draft in question.

We are, however, unable to agree to this contention. The draft was received by plaintiff after banking hours on the 20th, and if demand for its payment in money had been made upon Tyler that evening and refused, and prompt notice of its nonpayment given to the Hide and Leather Bank, it would have received the notice the same evening, at any rate by the next morning, when, in fact, it did not receive notice of the nonpayment of the check until the 22d, a delay of from twenty-four to thirty-six hours. It is true that upon receipt of the notice of the nonpayment of the check the Hide and Leather Bank attached

all it could find of Tyler's property in the state of New York, on another claim which it held against him, yet if the draft had been presented and payment refused and it had at once been notified on the evening of the 20th, it may be that it could have found other property of Tyler's which it could have attached on this debt. But in the view we take of the case the measure of damages is of no importance, as in no event is plaintiff entitled to recover.

3. Another contention is that the money, although paid by plaintiff to defendant as the agent of the Hide and Leather Bank, as defendant was notified before transmitting it to its principal that it was paid through a mistake, may be recovered back. It seems, both upon principal and authority, that where money has been paid by one joint agent to another ³³³ through mistake, and it has not been forwarded by the latter to the principal, or he has not done some act before notice of the mistake upon the assumption that the payment was good, by which he would suffer some damage if it should be held invalid, that the agent so paying may recover back the money thus paid: *Mechem on Agency*, secs. 560-562; *Herrick v. Gallagher*, 60 Barb. 566; *Cox v. Prentis*, 3 Maule & S. 345; *Buller v. Harrison*, 2 Cowp. 565. That this is the general rule there can be no question, but does it apply to this case. The Hide and Leather Bank was a holder for value of the draft, and was legally entitled to its payment, and if, as we have said, plaintiff, in receiving Tyler's check for the draft, and in surrendering the draft to him, did so without authority and thereby made the check its own, we are unable to see how defendant or its principal could in any way be affected by plaintiff's mistake as to Tyler's solvency and ability to pay the check. Moreover, the insolvency of Tyler was not such a mistake of fact as would entitle the plaintiff to recover the amount of the remittance to defendant in payment of the draft: *Boylston Nat. Bank v. Richardson*, 101 Mass. 287. Plaintiff took the check from Tyler on the faith of his solvency, and without being induced to do so by any fraud or mistake of fact or without information or knowledge with respect thereto. It had no right "to act upon mere guesses and surmises" (*United States v. Barlow*, 132 U. S. 271), and then claim that what it did was through a mistake of fact: *Canterbury v. Bank of Sparta*, 91 Wis. 53, 51 Am. St. Rep. 870.

It is insisted by defendant that plaintiff having elected to treat the check as its own, and brought several attachment suits

thereon against Tyler, that it cannot now pursue a different and inconsistent remedy by prosecuting this suit against it, but, as what we have already said necessarily results in an affirmance of the judgment, it is unnecessary to pass upon that question.

For these considerations we affirm the judgment.

Gantt, P. J., and Sherwood, J., concur.

DEMURRER TO EVIDENCE—PRACTICE.—A court may be asked to rule that, as a matter of law, judgment should be in favor of the party asking such ruling. To request such a ruling is equivalent to demurring to the evidence: *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 43 Am. St. Rep. 247. Upon a demurrer to the evidence of the plaintiff, he is entitled to the most favorable view of his case that the evidence warrants, and to every reasonable inference therefrom: *Larson v. Metropolitan etc. Ry. Co.*, 110 Mo. 234, 33 Am. St. Rep. 439. If it is overruled, and the defendant puts in his evidence, the supreme court, in reviewing the ruling, will do so in the light of all the evidence, and, if there is a case for the jury, the ruling will not be reversed: *Weber v. Kansas City Cable Ry. Co.*, 100 Mo. 194, 18 Am. St. Rep. 541. As to this "unusual and antiquated" practice, see, also, the notes to *Maple v. John*, 57 Am. St. Rep. 846; *Patton v. Bragg*, 35 Am. St. Rep. 733.

BANKS—COLLECTIONS—DUTY AS TO—PAYMENT.—As a collecting agent, it is the duty of a bank which receives a note or draft for collection to present it for payment, and, unless otherwise specially authorized, to receive in payment nothing but money, or that which, by common consent, is considered and treated as money: *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608. If a collecting bank takes a check in payment, but does not present the check until the next day, and the drawer fails in the meantime, and it appears that the check would have been paid if presented on the day when it was drawn, the bank is liable: See monographic note to *Allen v. Merchants' Bank*, 34 Am. Dec. 312, on the liability of banks as agents for collection.

STATE v. BOLTE.

[151 MISSOURI, 362.]

MANDAMUS—CO-ORDINATE BRANCH OF GOVERNMENT.—The judiciary cannot, by mandamus, control the action of a legislature, which is within its legislative power.

MANDAMUS—MATTER REQUIRING JUDGMENT OR DISCRETION.—The writ of mandamus may issue to an officer required by law to perform some ministerial duty, but not, in a matter requiring judgment or discretion, to direct or control him in the exercise of either.

MANDAMUS AGAINST PRESIDENT OF THE SENATE TO COMPEL HIM TO SIGN A BILL.—The action of the presiding officer of a state senate in ruling that a bill was not passed, upon the confirmation, by that body, of the report of a conference committee thereon, and in putting the question of the final passage of the bill to a vote, comes strictly within the line of his duties as president of the senate. His action, in such a case, is not ministerial, but requires judgment and discretion, and a court will not, therefore, award a mandamus to compel him to sign the bill, where it was, as amended by such report, put upon its final passage but failed to receive a constitutional majority, for it would be a gross usurpation of power for the court to assume functions which belong exclusively to the legislative body.

Edwards & Edwards, for the relator.

W. H. Haynes, for the respondents.

³⁶³ **BURGESS, J.** This is a proceeding by mandamus begun in this court on the information of a private citizen to compel the presiding officer of the senate and its secretary, and the speaker of the house of representatives and its chief clerk, of the fortieth general assembly to perform an official ³⁶⁴ act which it is alleged is required of them by the constitution of the state.

The alternative writ was issued on the twentieth day of May, 1899, and is as follows: "Whereas, it has been represented to our honorable supreme court by petition of S. P. Davisson, that on the eighth day of November, 1898, he was over the age of thirty years, a citizen of Missouri for more than a year prior to said election and was elected to the senate of the state of Missouri from the fourth senatorial district of said state, to which he was eligible, and received his certificate of election from the secretary of state, and on the fourth day of January, 1899, was duly sworn in as a member of said senate and at once entered upon the discharge of his duties as such senator under the laws and constitution of the state; that said body, to wit, the state senate, is authorized and empowered by the laws and constitution of the state to enact such laws for the government of the

people in connection with the other branch of the legislature as they may deem right and proper in the discharge of their duties for the protection of the property and person and government of the people of said state; that in the discharge of his said duties as such senator and in connection with the other senators, said senate did pass and enact into a law a bill entitled, 'An act to prohibit the sale by dramshop keepers of spirituous, vinous, and malt liquors in places other than the dramshop. To prohibit winerrooms, lunch counters, and to amend chapter 56 of the Revised Statutes relating to dramshops by the addition of a new section thereto,' said bill being numbered 88. That after said bill had been passed into a law by the senate as far as could be done by that body, it was sent to the house of representatives, where it was duly concurred in by said body, after being amended by said house of representatives, and was duly returned from said house to the senate aforesaid for the concurrence of that body in said amendment; that said amendments were duly considered by the senate aforesaid ³⁶⁵ and were rejected, of which nonconcurrence said house of representatives was duly notified and, said house refusing to recede from its said amendments, a conference was had by committees duly selected from the senate and house aforesaid, who, after considering the matters submitted to them, did agree and reduce said agreement to writing, and said committees duly reported their said agreement in writing to each branch of the said general assembly of Missouri, where said reports were received and duly adopted by each of said houses in the manner required by section 32, article 4, of the constitution of the state of Missouri, and thereby became a part of the record of said senate, and by the act of adopting said report, by each of said houses as aforesaid, said senate bill numbered 88, the title to which is herein set out with the house amendments thereto, as reported by said conference committee, became a valid and binding act upon the state of Missouri, except the necessary requirement of signing said bill by the presiding officers of said senate and house of representatives, and it then became the duty of you, A. H. Bolte, as presiding officer, and you, W. S. McClintick, temporarily presiding over the senate, at the time of the passage of said bill No. 88, and the adoption of said conference report, to affix your signature to said bill, and transmit the same through your secretary to the speaker of the house of representatives that he might affix his signature to said bill, as required by the constitution of the state, it being charged and alleged in the petition filed herein

that you, the said Bolte, and you, the said McClintick, were duly elected as president and presiding officers over said senate, and that you the said McClintick were the acting presiding officer at the time of the passage of the bill aforesaid, and it was your duty after the passage of said bill, which was the adoption of said conference report, to immediately suspend said business of the senate and affix your signature to said bill and immediately to cause said bill to be ³⁶⁶ transmitted to the house of representatives by the secretary of the senate for the signature of the said speaker, and it is further charged that you, as such presiding officer, are preventing the said secretary, who is alleged to be Cornelius Roach, from discharging his said duty in the premises, and that you and the said secretary have combined with other persons, unknown to petitioner, to prevent said bill becoming a law, and it is further charged that the said speaker of the house of representatives would affix his signature to said act if you would do your duty in the premises. It is further charged that the act aforesaid is an important enactment and law, and is for the best interest of the people of the state of Missouri and of all good citizens that it should become a law, and would become a law but for the failure of you and your associates to do your duty in the premises. It is further charged in said petition that the said A. H. Bolte is the duly elected and acting lieutenant governor of Missouri, and that you have been duly elected as temporary presiding officer over the senate of Missouri, and that your duties are fully set forth in the petition filed herein, among which is, while so presiding, when a bill has been passed by your body and concurred in by the house of representatives and returned to the senate, to immediately suspend all business and cause said bill to be read in open session, and, when so read, to affix your signature to the same and cause it to be sent at once to the house of representatives, and it is further charged that you were the presiding officer at the time of the passage of the bill aforesaid. It is further charged that the said Cornelius Roach is the duly elected and acting secretary of said senate, and that it is his duty to transmit said bill to the other house after being signed by you, and also to deliver the same to the governor, and that he is prohibited by you from doing his duty and refuses to do his duty in the premises, and that he refuses to cause the necessary acts to be done to complete said bill as aforesaid. It is further charged that the said W. J. Ward is ³⁶⁷ the speaker of the house of representatives, and that he is willing to do his duty in the premises as also his said

chief clerk of said house of representatives, who has been legally elected to said position of clerk, but is prohibited from so doing by you and by your refusal to do your duty in the premises. It is further alleged in said petition that the petitioner is interested herein, and that he makes this request and files this petition in the interest of himself and all other good citizens of the state, and that he is remediless in the premises, and that said law is a proper and important one to the people of the state and should be legally enacted into existence for the best interests of the petitioner and all other good citizens of the state, and that through your failure to discharge your duties as aforesaid that said bill will fail to become a law unless we interfere herein by the extraordinary writ of mandamus; that he has no other remedy nor have the people of the state any other remedy.

"Now, therefore, we being willing that full and speedy justice be done in the premises, do command you and each of you the said A. H. Bolte, the said W. S. McClintick, and the said Cornelius Roach, and the said W. J. Ward, and the said H. A. Newman, that each of you proceed at once to do your duty in the premises and that you the said W. S. McClintick, as presiding officer of the senate of the state of Missouri, cause said bill No. 88, as aforesaid, to be read in open session of the senate, and that, after it is so read, you affix your signature to said bill at once, and that you then cause said bill to be transmitted to the house of representatives so that said speaker, W. J. Ward, may affix his signature thereto, and you the said Ward, as speaker as aforesaid, are hereby required to cause said bill to be read in open session of the house of representatives, and after which that you affix your signature thereto immediately and at once return it to the senate aforesaid, and that you, the said Cornelius Roach, secretary as aforesaid, deliver into the hands of the governor at once said ³⁶⁸ bill No. 88 as amended by the committee report, and that you, and each of you, do and perform every act required by the constitution and laws of this state of you in order that said bill No. 88, amended as aforesaid, become a law, or show cause before our honorable supreme court at its courtroom in the city of Jefferson, and state of Missouri, on Tuesday, the twenty-third day of May, 1899, at the hour of 10 o'clock, why you have not done so."

Respondents Bolte, McClintick, and Roach made return to said writ as follows:

"Now comes A. H. Bolte, president of the senate, et al., aforesaid, and for his return to the said writ of mandamus, says that he is president of the senate of the state of Missouri as charged. That W. S. McClintick is president pro tempore and C. Roach is secretary of said senate as charged. That the relator, S. P. Davisson, is one of the members of the said senate of the fortieth general assembly as charged.

"The said senate passed senate bill No. 88 sent through to the house of representatives, where it was amended by said house and passed as amended, and sent back to said senate, and said house amendment was by the said senate rejected, and said house refused to recede from said amendment, and thereupon a conference committee was appointed by the two houses, which conference committee duly considered said amendment and made their report to each of said houses, which report was by said senate adopted as charged.

"That said bill, as amended by said report, was thereupon by said senate put upon its final passage and received but seventeen votes out of thirty-four senators elect, or one vote less than a constitutional majority, and was, by the president pro tempore then presiding, declared lost, and so recorded and entered on the journal of said senate on the — day of May, 1899, which said ruling of said president pro tempore was not appealed from, and remains in full force and effect.

369 "That said bill cannot be signed for the reason that, under the rules of the senate as authorized by the constitution, all bills passed must be enrolled by the enrolling clerk of the senate and the same examined by the committee on enrolled bills and returned to the secretary of the senate with the words 'Truly enrolled' indorsed thereon.

"That at the time of the alleged passage of said bill there were under the rules of said senate duly adopted and enforced an appointed and acting enrolling clerk of the senate, to wit, one H. H. Russell, and also a duly appointed standing committee of the senate known as the committee on enrolled bills.

"That said bill has not been enrolled nor passed upon nor compared by said enrolling committee, and therefore cannot be signed by the president and secretary of the senate, for the reason that the same must lie duly enrolled and reported upon as aforesaid before it can be signed by the presiding officer of both houses of the general assembly in open session after having been fully read at length as required by the constitution, and the fortieth general assembly having, pursuant to a joint reso-

lution duly adopted by both houses on the twenty-second day of May, 1899, adjourned sine die.

"That under the constitution of this state this court has no jurisdiction of these defendants, nor of the subject matter contained in plaintiff's petition."

The speaker of the house, W. J. Ward, and its chief clerk, H. A. Newman, made return to said writ in which it is averred that no such bill as the one therein mentioned has ever been presented to them for their signatures, but that if such a bill had been presented to them duly enrolled, and properly certified, as required by the constitution and laws of Missouri during the fortieth general assembly they would have signed the same, etc. That while the general assembly ³⁷⁰ was in session when the writ was served upon them, it adjourned sine die on May 22, 1899. To the returns relator filed demurrers which in their nature are general.

The question which lies at the foundation of this proceeding is as to whether or not mandamus will lie by one branch of our state government against another co-ordinate branch, of which the legislature is one. There are three departments of government, the legislative, judicial, and executive. The legislative department enacts the laws, the judicial department construes them, and the executive department enforces them. "They are entirely independent of each other, and each is supreme in its own domain. It then becomes important to determine to what extent the judiciary department could interfere in the operations of the other departments by the use of the writ of mandamus. While, on the one hand, it is claimed that the judiciary must be supreme in the determination of all questions which come before it in the course of legal proceedings, yet, on the other hand, it is asserted that the other departments, being supreme in their spheres of action, cannot be controlled by the judiciary, nor can the judiciary direct them or supervise them in the performance of their duties": Merrill on Mandamus, sec. 91.

Where the action of the legislature is within its legislative power it cannot be controlled by the judiciary by mandamus, or in any other way, for to do so would be the usurpation of a power which does not belong to the latter.

Ex parte Echols, 39 Ala. 698, 88 Am. Dec. 749, was a proceeding by mandamus to compel the speaker of the house to send to the senate a bill which was alleged to have passed the house, and which he refused to send to the senate, because of an al-

leged erroneous construction placed by him, and by the house on appeal from his decision, on a constitutional provision requiring a vote of two-thirds in each house to pass the bill, and ³⁷¹ the supreme court refused to award a mandamus or any other legal process on the application of a member to compel him to do so. The court said: "This was a question certainly within the jurisdiction of the speaker of the house to pass upon, and is not a mere ministerial duty, but one that pertains to their legislative functions, and is one over which the house has exclusive jurisdiction. No other department of the government can revise its action in this respect, without a usurpation of power. . . . This court will not interfere with either of the other co-ordinate departments of the government in the legitimate exercise of their jurisdiction and powers, except to enforce mere ministerial acts, required by law to be performed by some officer thereof; and not then if the law leaves it discretionary with the officer or department. . . . It seems to be held by all the authorities that the writ of mandamus can only issue to some officer required by law to perform some ministerial act, or to a judicial officer to require him to take action; but not in a matter requiring judgment or discretion, to direct or control him in the exercise of either. Among all the cases and text-books on this subject, none go to the length of laying down the doctrine that the speaker of the house of representatives, or of a legislative body, in a matter arising in the regular course of legislation, upon which he is called to decide, can be controlled by this or any other tribunal, except by the one over which he presides; and that, having sustained his opinion and action, this court cannot review it."

Again, in *United States v. Guthrie*, 17 How. 304, the court says: "Thus it has been ruled that the only acts to which the power of the courts, by mandamus, extends are such as are purely ministerial, and with regard to which nothing like judgment or discretion in the performance of his duties is left to the officer; but that, whenever the right of judgment or decision exist in him, it is he, and not the courts, who can regulate its exercise."

³⁷² So in the case at bar the most that can be said in support of relator's contention is that the presiding officer of the senate was in error in ruling that the bill was not passed upon the confirmation by that body of the report of the conference committee with respect thereto, and in putting it to a vote of the senate. It was with respect to a matter which came strictly

within the line of his duties as the presiding officer of the senate and not merely ministerial. His action required the exercise of judgment and discretion, and was not simply perfunctory.

It is true that in *Ex parte Pickett*, 24 Ala. 91, the supreme court of Alabama awarded mandamus against the speaker of the house of representatives of that state, to compel him to certify to the comptroller of public accounts the amount to which the petitioner was entitled, as a member of said house, for mileage or per diem compensation; and that in *State v. Moffitt*, 5 Ohio, 358, under a law which required that the election or appointment of all officers elected or appointed by the legislature should be certified by the speakers of both houses thereof, mandamus was awarded to compel them to do so. But in both of these cases the acts which the officers were compelled to perform by mandamus were purely ministerial and not within their legislative functions.

The case of *State v. Mead*, 71 Mo. 266, was a quo warranto proceeding, and has no application, we think, to the case at bar. Nor has the case of *State v. Meier*, 143 Mo. 439, for the reason that it was a proceeding by mandamus against the president of a subordinate tribunal, and not, as in this case, against a co-ordinate branch of the state government. Moreover, it was to compel the performance of an act purely ministerial.

While it is the duty of the supreme court to construe laws enacted by the general assembly, and, while it has the power to declare them valid or invalid as the case may be, it ³⁷³ would be a gross usurpation of power for it to assume functions which belong exclusively to that body.

Our conclusion is, that the demurrer to the return should be overruled, and peremptory writ denied, and it is so ordered.

Gantt, P. J., and Sherwood, J., concur.

MANDAMUS DOES NOT ORDINARILY ISSUE TO CONTROL A DISCRETION to compel an officer to act where judgment is required. But this is not universally true, for the writ may issue to correct an abuse of discretion: *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249; note to *State v. Rickards*, 50 Am. St. Rep. 489; *State v. Board*, 134 Mo. 296, 56 Am. St. Rep. 503.

MANDAMUS AGAINST LEGISLATURE.—The members of the legislative department of a state cannot be directly controlled by mandamus in the exercise of their legislative powers: *Greenwood etc. Land Co. v. Routt*, 17 Colo. 156, 31 Am. St. Rep. 284; note to *People v. Morton*, 66 Am. St. Rep. 556; *Ex parte Echols*, 39 Ala. 698, 88 Am. Dec. 749; for this could not be done without a gross usurpation of power on the part of the judicial department of the government: See extended note to *Mayor v. Morgan*, 18 Am. Dec. 239.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY v. SOUTHERN RAILWAY NEWS COMPANY.

[151 MISSOURI, 373.]

RAILROADS—CONTRACT OF INDEMNITY—RIGHT TO MAKE.—While a railroad company will not be permitted by contract, or otherwise, to exempt itself from liability for losses caused by its own negligence, or that of its servants, there is nothing to prohibit it from contracting with a third person for indemnity against these very same losses. It may, therefore, by such a contract, indemnify itself against loss for injuries to passengers, though the injury is caused by its own negligence, or that of its servants or employes. The indemnity in no way affects the liability of the company to the person injured.

RAILROADS—CONTRACT OF INDEMNITY—PUBLIC POLICY.—A contract between a railroad company and a news company, whereby the former, for a valuable consideration, grants to the latter the privilege of selling "periodicals, newspapers, books, confections, fruits, cigars, cakes, pies, and sandwiches," upon its regular passenger trains, during a time specified, and which contains a clause stipulating that the news company shall indemnify the railroad company against any loss which it may sustain by reason of injuries to person or property, suffered or sustained by any agent or employe of the news company, whether such loss or injuries arise from the negligence of the employes of the railroad company, or otherwise, is not against public policy, but is a valid and enforceable contract. It is not an attempt by the railroad company to limit its liability to passengers for injuries caused by the negligence of its servants, but is a contract to indemnify that company for the sums it must pay on account of its negligence.

RAILROADS—CONTRACT OF INDEMNITY—RECOVERY UPON.—If a news company agrees, for a valuable consideration, to indemnify a railroad company for any loss it may sustain by reason of having to pay for an injury to any agent or employe of the news company while upon the cars of the railroad company, and a newsboy, in the employ of the news company, receives injuries resulting in death while on the railroad company's train, through the negligence of its servants, and during the time that such contract is in force, the railroad company is entitled to recover, where it pays a judgment obtained against it in a suit brought by the boy's legal representative, and then sues upon the contract of indemnity with the news company, to recover the amount of the judgment. The news company would not, however, be liable on the contract sued on, if the boy was killed while acting as a "lookout" on the railroad company's train, and while outside of his employment as news agent.

APPEAL—FINDINGS OF FACT—CONCLUSIVENESS OF.—When issues of fact have been submitted to a court, and its finding is supported by evidence, it is conclusive on appeal. Hence, a finding, supported by evidence, that a newsboy on a railroad train was not killed while acting as a "lookout" thereon, at the instance of the railroad company will not be disturbed on appeal.

RAILROADS—CONTRACT OF INDEMNITY—PENDENCY OF LITIGATION—EFFECT OF NOTICE OF, AS TO INDEMNITOR.—If one is bound to protect another from a liability, he is bound by the result of a litigation to which such other is a party,

where he had notice of the suit and an opportunity to control and manage it. Hence, where a defendant news company was notified of the pendency of a litigation which resulted in a judgment against the plaintiff railway company, on a liability against which the defendant, by its contract, had agreed to indemnify it, and was afforded ample opportunity to control and manage that litigation, but refused to have anything to do with the defense of the case or settlement of the claim, it is bound by such judgment, though it is the result of a compromise.

RAILROADS—CONTRACT OF INDEMNITY—JUDGMENT BY CONSENT BINDS INDEMNITOR.—When a news company has agreed to indemnify a railroad company for any loss it may sustain by reason of an injury to any agent or employé of the news company while upon the cars, and an accident occurs on the railway which subjects the railroad company to a liability for which it is sued, the fact that the railroad company compromises the claim without the assent of the news company, and consents to a judgment against itself for the amount agreed upon, does not render such a judgment erroneous, where the settlement was made in good faith and the amount of the judgment was reasonable. The only effect that the railroad company's consent to the rendition of the judgment could have, would be to reduce the judgment from conclusive to presumptive evidence only of the news company's liability on its contract, and of the amount thereof, and to afford it the right and privilege of showing either that the judgment was procured by a fraudulent collusion, was not founded upon a legal liability, or that it exceeded such liability.

Wallace & Wallace, for the appellant.

Pratt, Dana & Black, for the respondent.

378 BRACE, P. J. On the 28th of December, 1889, the plaintiff and defendant entered into a written contract by which the plaintiff, for and in consideration of the sum of fifteen hundred dollars, and of the covenants of the defendant therein contained, granted to said news company the privilege of selling upon its regular passenger trains during the year beginning January, 1890, "periodicals, newspapers, books, confections, fruits, cigars, cakes, pies, and sandwiches," under certain conditions and regulations therein set out, said contract containing among others the following covenants upon the part of the defendant, to wit:

"And, in consideration of the foregoing grant and the privileges therein specified, said news company releases said railroad company from any right of action, claim, or demand which may accrue to it by reason of the loss of any of its property while being transmitted on any of the trains of the railroad company under the terms of this contract, and further agrees for such consideration to indemnify said railroad company and save it harmless from all claims, demands, damages, actions, costs, and charges to which the railroad company may

be subject or which it may have to pay by reason of any injury to any person or property, or loss of life or property, suffered or sustained by any agent or employé of the news company while in, upon, or about any of the stations, platforms, cars, or other premises of the railroad company, whether such injuries or loss arise from the negligence of the employés of said railroad company or otherwise."

³⁷⁹ This is an action for damages for breach of the second covenant aforesaid, in which the plaintiff recovered judgment in the circuit court of Jackson county, for the sum of five thousand dollars, and the defendant appeals. The case was tried by the court without a jury, the court finding the facts to be as follows:

"1. Plaintiff is a railroad corporation, owning and operating at the times mentioned in the amended petition, a line of railway in the states of Tennessee, Mississippi, and Alabama, and defendant is and was at the same times a corporation organized and existing under the laws of Kentucky, and having an office for the transaction of its usual and customary business in Jackson county, Missouri, and at such times was engaged in selling newspapers, books, periodicals, and merchandise on railroad trains throughout the country through agents and servants commonly and generally known as 'newsboys.' And in conducting such business it was usual and necessary for such agents and servants to pass back and forth from car to car on the trains while the latter were in motion.

"2. On December 28, 1889, plaintiff and defendant entered into a written contract, a copy of which is set forth in the amended petition filed herein, on the twenty-second day of February, 1896.

"3. Pursuant to the terms of said contract said plaintiff, throughout the year 1890, received and carried upon its trains the agents, employés, and merchandise of said defendant, placed thereon by the latter, and afforded such agents and employés facilities for selling and offering for sale such merchandise. Among such agents and employés of said defendant was one George W. Davis, who, in the course of his employment and acting as agent for defendant, did on the twenty-first day of October, 1890, at plaintiff's station of Birmingham, Alabama, under the provisions of said contract, enter and go upon one of plaintiff's passenger trains with the merchandise furnished him by said defendant, and for the ³⁸⁰ purpose of selling the same thereon. On the same day, while said train was moving over

plaintiff's said road, between said Birmingham and the station of Ensley, and while in said state of Alabama, it came in collision with another train on plaintiff's road, and, in consequence thereof, said George W. Davis, while so on said passenger train as an agent and employé of said defendant as aforesaid, received injuries from which he subsequently died. Such collision occurred and such death was caused by the negligence of plaintiff's employés in the operation of such train, and the personal representatives of Davis were thereby damaged in the sum of five thousand dollars.

"4. The laws of Alabama (Civ. Code 1896, vol. 1, sec. 27) in force at the time the plaintiff became and was liable to the personal representative of such Davis for such damages as were occasioned by the negligence aforesaid, provided as follows: 'A personal representative may maintain an action, and recover such damages as the jury may assess, for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death; such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for such wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate.'

"5. The true construction of said statute, as decided by the supreme court of Alabama, which is the court of last resort in that state, is and was that a person entitled to recovery ³⁸¹ at all thereunder, may recover any amount which a jury may see fit to allow, there being no limit fixed by law to the amount of the verdict which a jury may render in an action under said statute.

"6. George W. Davis received his injuries on the twenty-first day of October, 1890, and died therefrom on the twenty-ninth day of November, 1890; and his administrator instituted a suit in the city court of Birmingham, Alabama, on February 2, 1891, against plaintiff for fifty thousand dollars damages for such injuries received as claimed through the negligence of the

plaintiff. Plaintiff herein was duly served with process in such suit, which was on the eighteenth day of June, 1891, dismissed.

"7. After the death of George W. Davis, and on the second day of February, 1891, the probate court of Jefferson county, Alabama, a court having, under the laws of Alabama, full jurisdiction, appointed Eugene S. Smith as the administrator of said Davis, and under the laws of Alabama said administrator became and was the personal representative of said Davis and entitled to have and recover the damages authorized by the laws of Alabama for the death of said Davis through the negligence of the employes of plaintiff.

"8. On the nineteenth day of June, 1891, Eugene S. Smith, administrator of George W. Davis, deceased, instituted in the circuit court of Walker county, Alabama, a court of competent jurisdiction under the laws of Alabama, a suit against plaintiff for fifty thousand dollars damages for the death of said Davis, through the negligence of the plaintiff's employes. The plaintiff herein, as defendant therein, was duly summoned with process in accordance with the laws of Alabama. On the sixteenth day of February, 1892, said suit was dismissed.

"9. On the eighteenth day of September, 1891, Eugene S. Smith, as administrator of George W. Davis, deceased, filed in the city court of Birmingham, Alabama, a court of competent jurisdiction under the laws of Alabama, a suit against this plaintiff for twenty thousand dollars damages for the death of George ³⁸² W. Davis through the negligence of this plaintiff's employes. Process was served on this plaintiff as required by the laws of Alabama, and this plaintiff, as defendant therein, entered its appearance to said suit. A jury was duly impaneled in said cause, and, on the eighteenth day of September, 1891, rendered a verdict for the administrator, assessing the damages at five thousand dollars, for which amount said court, on the eighteenth day of September, 1891, rendered judgment in favor of the said administrator and against this plaintiff, which judgment this plaintiff on the eighteenth day of September, 1891, paid to said Eugene S. Smith, administrator of said Davis.

"10. As a matter of fact, the verdict and judgment for five thousand dollars were entered by and with the consent of the parties, though the proof of this fact was received over the objection of the plaintiff that such proof was incompetent and immaterial. As a matter of fact, there had been negotiations to compromise the case pending in Walker county, Alabama, and

five thousand dollars was the best settlement that could be made, and was a reasonable sum to be allowed for the damages, and so it was decided between plaintiff and said administrator after long negotiation, that there should be a settlement for that amount, and, pursuant thereto, it was agreed to dismiss the case in Walker county, and institute a new suit in the city court of Birmingham, Alabama, in which the jury should assess the damages at five thousand dollars, and the court render judgment therefor. This was all done in good faith and was a reasonable settlement.

"11. This plaintiff did hire doctors and incur expenses for medical treatment and hospital care of George W. Davis while he was suffering from his injuries, and paid therefor four hundred and thirty dollars and eighty-five cents, which was a reasonable sum to pay therefor. It also hired an undertaker to prepare his body for burial and furnish a coffin therefor, and paid such undertaker eighty dollars, which was a reasonable sum to pay therefor. But the court refused ³⁸³ to allow plaintiff for that money so expended as aforesaid. To which refusal of the court the plaintiff excepted.

"12. This plaintiff on October 8, 1891, demanded of this defendant the five thousand dollars on account of the payment of the judgment aforesaid, and also said sum of five hundred and ten dollars and eighty-five cents, and this defendant refused to pay either of said sums.

"13. On the twenty-first day of February, 1891, this plaintiff notified this defendant of the pendency of said suit of said administrator in the city court, and was called upon by this plaintiff to defend the same or settle the claim, but refused to have anything to do with the defense of the case or settlement of the claim, and thereafter and prior to the rendition of the judgment of the city court of Birmingham in the last case, this defendant was fully notified of the pendency of the case in Walker county, the negotiations for a settlement and that the case would be settled for five thousand dollars and defendant made no objection to the amount, but said that it was a reasonable sum, and the only objection made by this defendant to the settlement was that it could not take any part in the defense or settlement, because it was insured by some insurance company which had the control of the matter.

"14. The collision in which the newsboy, George W. Davis, was injured occurred by reason of the engineer of the passenger train mistaking a signal and starting from Birmingham with

only the baggage-car and two passenger coaches attached to his engine, having left the sleeping-car, which was a part of the train, in Birmingham, and having started without the conductor or brakeman of the train. The engineer learned these facts upon stopping at Ensley, the first station west of Birmingham and about five miles therefrom. The fireman was on the engine with the engineer, and baggageman in the baggage-car attached to the engine. There were a good many passengers in the two coaches. Upon finding that he had left part of the train and the conductor and brakeman in Birmingham, the engineer asked the newsboy, ³⁸⁴ Davis, if the red lights were on the rear end of the coach, and told him to get on the platform of the rear coach and that the train would be backed up to Birmingham for the conductor, and also told him to signal if he saw anything in the way; thereupon Davis said he would, and started toward the back end of the train, and was afterward seen looking through the rear door of the coach, but inside thereof—said rear door was locked—but at the time of the collision was running through the rear coach in the direction of the engine, and just after the collision was seen crawling on his hands in the aisle of the rear coach, dragging his legs, going toward the engine and right ahead of a witness seated four or five seats from the rear of the coach. As the collision came, the newsboy came running past two witnesses who sat about the fourth seat from the rear of the coach, the same being the front of the coach while backing toward Birmingham. The newsboy came from toward the rear door of the coach running toward the engine of the passenger train. The evidence fails to show that Davis obeyed the directions of the engineer except as above stated. Under the laws of Alabama, railroad companies are liable for negligence of coemployés in some cases, and under the laws of that state Davis did not, by reason of the directions of the engineer, even had he acted under such directions and obeyed them, become an employé of the railroad company or cease to be a servant of the news company."

The finding of facts by the trial court is exhaustive, supported by the evidence, and furnishes a sufficient statement for the discussion of the legal questions raised.

1. It is contended that the contract sued on is against public policy, and is for that reason void. The argument in support of this contention is made from the standpoint of the deceased news agent and his relation to the railroad company, and is predicated on the well-settled principle that a common

carrier cannot by contract limit its liability to a passenger for the negligence of its servants. It may be conceded that the ³⁸⁵ news agent in this case was a passenger on the train in which he lost his life and that the company could not, by a contract such as this, relieve itself of its duty to him as a common carrier of passengers, or of its liability to him for the negligence of its servants: *Jones v. St. Louis etc. Ry. Co.*, 125 Mo. 666, 46 Am. St. Rep. 514; *Magoffin v. Missouri Pac. Ry. Co.*, 102 Mo. 540, 22 Am. St. Rep. 798; *Mellor v. Missouri Pac. R. R. Co.*, 105 Mo. 455; *Voight v. Baltimore etc. R. R. Co.*, 79 Fed. Rep. 561, and cases cited; *Railroad Co. v. Lockwood*, 17 Wall. 359; *Starr v. Great Northern Ry. Co.*, 67 Minn. 18. But the contract in question is not with a passenger, it is not with a person to whom the company owed a duty as a common carrier of passengers, nor does it in terms, as it could not in effect, attempt to relieve the railroad company from any of its duties or liabilities as such. The contract is simply one of indemnity, by which the news company agreed, for a valuable consideration, to indemnify the railroad company against loss which the latter might sustain by reason of the duty it would incur to the news agent, as a common carrier of passengers, in carrying out the contract. In *Phoenix Ins. Co. v. Erie Transp. Co.*, 117 U. S. 324, it was held by the supreme court of the United States that: "No rule of law or public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants. By obtaining insurance, he does not diminish his own responsibility to the owners of the goods, but rather increases his means of meeting that responsibility." In the subsequent case of *California Ins. Co. v. Union Compress Co.*, 133 U. S. 415, that court was asked to review its announcement of this principle, to which it was replied: "Nor are we disposed to review our decision that common carriers can insure themselves against loss proceeding from the negligence of their own servants. The doctrine announced in the case cited has been referred to with approval in the subsequent ³⁸⁶ cases of *Orient Ins. Co. v. Adams*, 123 U. S. 67, 72, and *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 498." That this doctrine is supported by the great weight of authority is manifested by the cases cited in the above cases, by others in the brief of counsel for the plaintiff, and by some of those cited by counsel for

the defendant. While in the great majority of the cases the principle has been applied to contracts of indemnity against damages for the loss of property, that it is equally applicable to like contracts against losses for injuries to passengers has in two very recent cases been directly decided: American Casualty Ins. Co's Case, 82 Md. 535; Trenton Pass. Ry. Co. v. Guarantor's Liability Indemnity Co. (1897), 60 N. J. L. 246. In these cases the question was maturely considered, and thoroughly discussed, and in each, after a review of the authorities, the conclusion reached was that "a contract to indemnify a common carrier of passengers against losses occurring from injuries to passengers carried by it is not invalid as against public policy, because it covers losses resulting from its negligence, or negligence of its servants." To the trenchant argument in support of this conclusion of McSherry, C. J., who delivered the opinion of the Maryland court of appeals in the first case, and which was highly commended and followed by the supreme court of New Jersey in the second, no additional force could be added by any words of ours. We shall therefore content ourselves for argument on this branch of the case with the following extract from that opinion.

"Whilst the carrier will not be permitted, by contract or otherwise, to exempt himself from liability for losses caused by his own negligence or the negligence of his servants, there is no reason of public policy which prohibits him from contracting with a third person for insurance against these very same losses. Consequently, he may by insurance indemnify himself against loss of or injury to property ³⁸⁷ intrusted to his care, even where the loss or injury is caused by his own or his servant's negligence. This was decided in Phoenix Ins. Co. v. Erie etc. Trans. Co., 117 U. S. 324; and the ground upon which the decision was based was that such insurance did not diminish the carrier's own responsibility to the owner of the goods, but increased the means of meeting that responsibility. Notwithstanding such insurance the carrier remains liable to the owner or shipper of the goods, and by insuring them he merely contracts, as in every other instance of a reinsurance, with someone else for reimbursement for such loss. The doctrine announced in Phoenix Ins. Co's case was affirmed in California Ins. Co. v. Union Compress Co., 133 U. S. 387, and is the settled law of the land. A reasonable restriction by contract of his common-law liability and an insurance by the carrier of goods against loss are recognized by the law and are not in con-

travention of its policy to-day, whatever that policy might have been heretofore.

"It is obvious that a carrier of passengers cannot by contract restrict, diminish, or limit that obligation to the public, or that duty to the passenger, which requires the exercise of the highest degree of care and diligence on his part. A contract which stipulates for or agrees to such relaxation, and therefore contemplates immunity from the carrier's own negligence, would be utterly void; precisely as would a contract purporting to relieve a carrier of goods from liability for losses occasioned by his own or his servant's negligence. But the policies before us are not contracts of that character. Neither in express terms nor by implication do they profess or purport to abridge, in any way, the carrier's common-law liability for injuries to passengers, employés, or strangers. These policies leave that liability precisely where and as complete as it was before they were written. They contain no provision impugning or questioning in the slightest degree the full measure of that responsibility. It is perfectly manifest, ³⁸⁸ therefore, that they are not in terms contracts restricting or attempting to restrict the carrier's conceded liability; and if they contravene public policy at all, it must and can only be incidentally and indirectly. This is all that can be imputed to them. But they are all, it is alleged, repugnant to public policy because, by furnishing the carrier with a fund with which to reimburse himself for losses caused by his own negligence, their inevitable tendency or effect is to induce less vigilance, or to promote greater carelessness on the part of the carrier. Precisely the same reasoning would invalidate, as repugnant to public policy, every species of fire and marine insurance. To the extent that a fire insurance policy affords an individual protection against loss, to exactly the same extent it may be said the assured will become indifferent in guarding against casualties from fire. And, in so far as a carrier may have a policy covering goods and insuring them for his own benefit against losses arising from his or his servant's negligence, just so far will he be either tempted to be negligent, or become indifferent as to vigilance. But in neither instance can it be said that, because a temptation to be negligent may possibly result from the possession of an insurance policy, the contract of insurance necessarily begets negligence or conflicts with public policy. Nor can we assume as an unvarying rule, of which judicial notice will be taken, that a carrier of passengers who has secured an indem-

nity to reimburse himself for losses which his own negligence may produce will, merely because and solely in consequence of having such indemnity—which at best is but limited and partial—necessarily disregard the duty to exercise the highest degree of care. And unless it be assumed as a postulate that the mere possession of an indemnity will of itself necessarily and invariably produce negligence, it does not logically follow that such a policy or indemnity is even incidentally or indirectly repugnant to public policy. The indemnity in no way affects the liability of the carrier to the person injured.”

389 The only distinction between those cases and the one in hand is, that in them the contracts were formal contracts of insurance with insurance companies, while the contract in question is a contract of indemnity by a news company. But a mere contract of insurance is nothing more nor less than a contract of indemnity against loss, as is this with the defendant, and the principles governing must be the same in each, and, as nothing can be predicated of the contract in this case which could interfere with or affect the liability of the carrier to the person injured, there is nothing in it to take it out of the principle of those cases, or render it obnoxious to public policy. Hence, we conclude that this contract cannot be avoided as against public policy.

2. It is next contended that “the defendant is not liable on the contract sued on for the reason that the newsboy was killed while acting as a lookout on plaintiff’s train, and while outside of his employment as news agent.” This theory of fact was presented upon the trial, and upon it the court declared the law to be: “The plaintiff could not take the newsboy, Davis, from the duties for which he was employed by the defendant, and send him to a place of danger to assist in the plaintiff’s own business, and while said Davis was at said place of danger by its, the plaintiff’s, own negligence injure said Davis so that thereafter he died, and then in this action recover the amount paid by it on account of the injuries so inflicted by it on said Davis.”

If the court had found the fact to be as predicated in this contention, under this declaration of law its finding and judgment would have been for the defendant, but the court in substance found the fact to be that the newsboy was not in fact killed in a place of danger to which he had been exposed while in the employ of plaintiff, that is to say as “a lookout on plaintiff’s train,” and the argument in support of it is aimed at

the finding of fact, and not at an error of law, and as the finding of the court is supported by the evidence, that ³⁹⁰ finding is conclusive on appeal, as has been uniformly held in cases at law, where the issues of fact are submitted to the court: *Sutter v. Raeder*, 149 Mo. 297; *Rogers v. Warren*, 75 Mo. App. 271; *Williams v. Monroe*, 125 Mo. 574; *Pitts v. Sheriff*, 108 Mo. 110; *Hamilton v. Boggess*, 63 Mo. 233. This point must be ruled against the defendant.

3. The defendant's next contention is that the judgment of the circuit court is erroneous, "for the reason that plaintiff's evidence showed that it compromised the claim made by the administrator without securing the assent of the defendant."

As was said by Wagner, J., in *Strong v. Phoenix Ins. Co.*, 62 Mo. 289, 21 Am. Rep. 417, the rule to be deduced from the whole current of authorities on this subject is, that "where one is bound to protect another from a liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the litigation, and opportunity to control and manage it"—a rule that has been frequently announced and approved in the decisions of this court: *Garrison v. Babbage Transp. Co.*, 94 Mo. 130; *St. Joseph v. Union Ry. Co.*, 116 Mo. 636, 38 Am. St. Rep. 626.

That the defendant was notified of the pendency of the litigation which resulted in the judgment against the plaintiff for five thousand dollars, on a liability against which the defendant by its contract had agreed to indemnify it, and was afforded ample opportunity to control and manage that litigation if it had seen proper to do so, was abundantly shown by the evidence, and was so found by the court (thirteenth finding).

The fact that the amount of the judgment was determined by agreement would not take the judgment without the protection of the defendant's covenant "to indemnify the plaintiff for all damage to which it may be subject or which it may have to pay." The only effect the consent could have would be to reduce the judgment from conclusive to presumptive evidence only of the defendant's liability on its ³⁹¹ contract, and of the amount thereof, and to afford it the right and privilege of showing either that the judgment was procured by a fraudulent collusion, was not founded upon a legal liability, or that it exceeded such liability: *Conner v. Reeves*, 103 N. Y. 527. This the defendant did not attempt to show, but, on the contrary, it affirmatively appeared from the evidence, and the court

found, that the settlement was made in good faith, that there was a legal liability for which the judgment was rendered, and that the amount thereof was reasonable (tenth and fourteenth findings).

We find no error in this record for which the judgment of the circuit court should be reversed, and the same is affirmed.

All concur.

PROMISE OF INDEMNITY—VALIDITY OF.—A promise of indemnity for the performance of an act not illegal, immoral, or against public policy is valid: *Smith v. Delaney*, 64 Conn. 264, 42 Am. St. Rep. 181; note to *Ives v. Jones*, 40 Am. Dec. 425.

JUDGMENT—CONCLUSIVENESS OF, AS AGAINST INDEMNITOR.—One who is required to protect another from liability is bound by the result of litigation to which such other is a party, provided the former had notice of such litigation and an opportunity to control its proceedings: *St. Joseph v. Union Ry. Co.*, 116 Mo. 636, 38 Am. St. Rep. 626.

CONCLUSIVENESS OF FINDINGS OF FACT.—The determination of the court below upon questions of fact is conclusive and final where there is any competent evidence legally sufficient to support it: *Swayne v. Waldo*, 73 Iowa, 749, 5 Am. St. Rep. 712; note to *Savannah etc. Ry. Co. v. Flannagan*, 14 Am. St. Rep. 188; *Devlin v. Quigg*, 44 Minn. 534, 20 Am. St. Rep. 592; *Pollock v. Carolina etc. Loan Assn.*, 51 S. C. 420, 64 Am. St. Rep. 683; or where the evidence is conflicting: *Holker v. Hennessey*, 141 Mo. 527, 64 Am. St. Rep. 524.

PROGRESS PRESS BRICK AND MACHINE COMPANY v. GRATIOT BRICK AND QUARRY COMPANY.

[151 MISSOURI, 501.]

MECHANIC'S LIEN—MATERIALS FURNISHED AT DIFFERENT TIMES AND UNDER DIFFERENT CONTRACTS.—It is not necessary to the validity of a mechanic's lien that a separate account should be filed for each separate contract under which materials have been furnished within the statutory period before a lien is filed, though the contracts are independent and the materials furnished under each are different, if the materials can be considered as having been furnished under one entire contract.

MECHANICS' LIEN—ENTIRE CONTRACT—ONE LIEN IS SUFFICIENT, WHEN.—If bricks, used in constructing kilns, and a press brick machine, used in pressing clay into bricks, to be burned in the kilns, were furnished to the owner of property within the statutory period before a mechanic's lien was filed, though the bricks and machine were not contracted for on the same day, they must be regarded as having been furnished under a single contract, if they were bought and furnished as parts of one general improvement of the property; if they were all necessary parts of one whole plant and were under a common roof; if the whole and all its parts

were constructed at substantially the same time; and if the business of making dry pressed bricks could not be carried on until the whole plant was completed. Hence, but one account and one lien need be filed for the whole of such materials.

INSTRUCTIONS—EVIDENCE.—An instruction to which no evidence adduced in the case can apply should not be given.

MECHANIC'S LIEN—MATERIALS FURNISHED FOR BRICK MANUFACTORY AS PART OF REALTY—INTENTION OF OWNER.—As between the owner and a mechanic, who furnishes materials, everything put into and forming part of a building or machinery for manufacturing purposes, and essential to the manufactory, is a part of the freehold. Hence, one who furnished machinery and bricks to an owner, who put them into a building, is entitled to a lien therefor, where it was the owner's intention to use the machinery and bricks in converting the whole property into a plant for the manufacture of bricks, and they became a part of such plant.

MECHANIC'S LIEN—MATERIALS FURNISHED—RIGHT TO LIEN WHETHER BUILDING IS OLD OR NEW.—Under a statute, the intention of which is to give a mechanic's lien where machinery or material furnished is designed by the owner to become a part of the building, manufactory, or plant for which it was supplied, it is not important whether it is used in constructing a new building for a manufacturing plant, or is used in converting an old, existing, frame house into such a plant.

MECHANIC'S LIEN—MATERIALS FURNISHED—TEST AS TO WHETHER MACHINERY IS PART OF REALTY.—In determining whether or not machinery furnished for a building, and put therein, has become a permanent part thereof, the intention of the owner is the first and best criterion, and the adaptability of the machinery to the uses and purposes to be subserved is the next best test.

MECHANIC'S LIEN—MATERIALS FURNISHED—RELATIVE VALUE OF MACHINERY AND BUILDING—SEPARATION.—One who furnishes machinery put into a manufacturing plant, which is suitable for the transaction of the business to be carried on in the building for which it was supplied, is entitled to a lien therefor, whatever may be the relative value of the building and machinery, or whether they can be separated easily or not.

MECHANIC'S LIEN—MATERIALS FURNISHED FOR BRICK MANUFACTURING PLANT AS PART OF REALTY—SEPARATE PARTS ON DIFFERENT LOTS UNDER ONE ROOF. If an owner is supplied with bricks and a press brick machine, his intention being to construct a dry press brick plant, and the separate parts of the plant and the machinery are all necessary to form one complete manufacturing establishment, which would not subserve the purpose intended if any one of the parts was omitted, and the whole is manifestly adapted to that use and purpose, the machine, when put in, and also the bricks which go into the kilns and form a necessary part of the plant, become a part of the realty. The buildings, erections, and improvements on the property are, therefore, subject to a mechanic's lien for both the machine and bricks furnished, although the several parts of the plant are separate, except for the roof which covers them, and notwithstanding the fact that the parts are located upon different lots, where the owner has, by his use of the property, obliterated the lot lines, and treated the whole of it as one lot.

Lee W. Grant and Lubke & Muench, for the appellant.

Farish & Williams for the respondents.

505 MARSHALL, J. This is an action to establish a mechanic's lien. The petition is in two counts. The first count alleges that the Gratiot Brick and Quarry Company bought of the plaintiff hard bricks to the amount of \$1,000; that said bricks were furnished for and used in the construction of a one and two story brick and frame structure, containing clay sheds, brick kilns, press, machine and boiler-house and appurtenances, known as a brick plant, erected on certain real estate described, comprising seven contiguous lots; that the fee simple title to the real estate was in the Gratiot Brick and Quarry Company at the dates of furnishing said materials; that on the twenty-eighth day of February, 1896, the Gratiot Brick and Quarry Company executed a certain deed of trust to Robert P. Williams, trustee for the American Exchange Bank, on these lots and other lots; that prior to these events, on the tenth day of May, 1893, Daniel McAllister and J. G. Hardy, who at that time owned said premises, executed a deed of trust on the same to Robert W. Frank, trustee for Albert J. Frank, securing an indebtedness therein described, which said indebtedness is now owned by defendant, C. Herman Beckman; that a general voluntary assignment was made by the Gratiot Brick and Quarry Company to defendant John G. Parrish, on the 28th of February, 1896; that the said bricks were furnished continuously from the 6th of August, 1895, to the 29th **506** of August, 1895, when the demand accrued; that plaintiff filed its lien account on the 25th of February, 1896; that no part of said account has been paid.

The second count alleges that on the 31st of July, 1895, plaintiff contracted to furnish for the defendant, Gratiot Brick and Quarry Company, for the sum of \$5,000, a six-mold press brick machine complete upon foundations; that said press should be able to make 30,000 good bricks per day of ten hours. The plaintiff furnished said machine for the one and two story brick and frame structure heretofore described, and situated upon the same premises; that said machine was furnished by plaintiff and accepted by defendant on September 24, 1895, and became a part of said frame and brick structure at said date; that there had been paid, in the shape of stock, \$2,000 on the purchase price of said machine; that the balance, \$3,000, is still due and unpaid; that the lien account was filed on the 25th of February, 1896.

Gratiot Brick and Quarry Company made default. Defendants Robert P. Williams, trustee, American Exchange Bank, Robert W. Frank, trustee, and J. G. Parrish, assignee answered admitting that the title to the premises in question was as stated in the petition and admitting the transfers as alleged in the petition, but denying all the other facts.

The trial developed these facts: Prior to August 5, 1895, one McAllister owned lots 5 to 21 inclusive in city block 4777 of the city of St. Louis, and had commenced the construction of a dry pressed brick plant thereon, the buildings needed therefor resting on parts of lots 11, 12, 13, 14, 15, 16, and 17. He sold the premises to the defendant, who continued and completed the erection of the improvements, for the same purposes. The plant consisted of a press-house, office, boiler and engine room, kilns and day sheds, which were so constructed that the whole was covered by one continuous roof, in order to go from one part to the other without exposing the dry clay to the elements; the part called the press-house ⁵⁰⁷ was inclosed on all sides, was a frame building, two stories high with a gravel roof; the whole plant was used as one plant, and the several parts were necessary to make up the whole plant, which would not be a complete plant if any of the parts were omitted. After the defendant purchased the premises, it bought from the plaintiff 202,000 hard bricks (for \$1,111) which were used in constructing the kilns, and also bought one six-mold pressed brick machine, weighing over 52,000 pounds, which was also necessary to complete the plant, and which was placed in the press-house on a rock and cement foundation, the flanges of the bed plate of the machine extending downward on the outside and inside of the rock foundation and were imbedded in cement about four and a half inches thick, so that the machine was fastened solidly to the foundation so that it could not be removed without breaking the machine or the foundation; the press was connected with the boiler-room by steam pipes and the necessary belting and shafting, and was also connected with the second story or hopper-room, by belting and shafting and machinery for driving and conveying clay by means of an elevator; the dry or harvested clay was brought from the clay sheds to the hopper and carried into the machine by the elevators; the boiler-house was constructed of brick and frame; the engine was partly in the press-room and partly in the engine-room; the whole plant, except the driveway and the coal chute, was inclosed on all sides and was covered by one roof,

and all the parts were connected so that the manufacture of the bricks might be carried on in one building so as not to expose the clay to the elements while being manufactured. The contract price for the machine was \$5,000, of which \$2,000 was to be in stock of the defendant company, so that the balance due the plaintiff is \$4,111, for which in due time a lien was filed.

When the defendant company purchased the property there was a mortgage on it, put there by the former owner. ⁵⁰⁸ After the plaintiff's rights under the lien had become fixed the defendant gave a second mortgage on the property to Williams as trustee for the American Exchange Bank, and afterward the company made an assignment for the benefit of creditors.

The court gave the following instructions at the instance of the plaintiff: "That there is no evidence to show any fraud or fraudulent design or purpose on the part of plaintiff in the preparation and filing of its lien claim; therefore, if from the evidence the court believes and finds that plaintiff is not entitled to a mechanic's lien for all of its claim, or that plaintiff is not entitled to such lien against all the property therein described, the court should, nevertheless, award to plaintiff a lien for such sum and to such extent as from the evidence the court may believe and find plaintiff is justly entitled to."

The court refused the following instruction offered at the instance of the plaintiff: "That if the court from the evidence believes the facts to be that defendant, Gratiot Brick and Quarry Company, acquired the lots which are in the petition and lien claim in this case described, for the purpose of erecting thereon a plant for the manufacture of brick by the dry process; that at the time when defendant so acquired said lots there was standing thereon in an unfinished condition a building designed to be used in the manufacture of brick; that thereafter said defendant ordered from plaintiff the brick press mentioned in said petition, and also ordered from plaintiff the brick in said petition specified; that plaintiff delivered said brick to said defendant, and the same were at the instance of said defendant used in putting up necessary kilns for the completion of said plant; that plaintiff also brought to defendant's said premises said press, and so affixed and built the same into the building aforesaid that the same became a part thereof; that there was also attached to said building a boiler and engine room, ⁵⁰⁹ and boiler, engine, and machinery necessary to operate said plant, and that said press was, at the instance of said

defendant, connected with said machinery; that conveyers or other appliances were also at the instance of said defendant placed in said premises, and that thereby the said kilns were connected with said machinery and press, and that all of the erections pertaining to said plant were placed under one continuous and permanent roof, so that there would be no exposure to the elements of the machinery or material used in the manufacture of brick in said plant; and if the court also believes and finds that said connected buildings and erections, as above described, extended in part over or upon the several lots aforesaid, then the court should find that said buildings, press, kilns, boiler, engine, and machinery constitute one structure, and that the same and the lots of ground aforesaid are subject to a mechanic's lien for the full balance due the plaintiff for the press aforesaid and work and labor of plaintiff connected therewith, and for the brick so delivered to defendant by plaintiff; and the court will find that plaintiff is entitled to such lien provided that plaintiff has by the evidence proved to the satisfaction of the court all other averments of said petition essential to the establishment of a mechanic's lien."

The court gave the following instructions at the instance of the defendants:

"1. The court declares the law to be that if plaintiff furnished, sold, and delivered to defendant, the Gratiot Brick and Quarry Company, the brick mentioned in the first count in plaintiff's petition under one contract; and if plaintiff furnished, sold, and delivered to the said defendant the press brick machinery mentioned in the second count in the petition under a separate and distinct contract, then these two matters form separate and distinct accounts, for which separate liens should be filed, and this action cannot be maintained and a lien established as is herein sought to be maintained.

510 "2. If the court, sitting as a jury, believes and finds from the evidence that the brick sued for in the first count of the petition were furnished to defendant, the Gratiot Brick and Quarry Company, under a separate and distinct contract to be used in the construction of brick kilns, and that the same or the greater portion thereof were so used; that said brick kilns were structures complete within themselves, resting and built on the ground, and not connected with or forming any part of any building, erection, or improvement—then the court declares the law to be that the plaintiff is not entitled to any lien for and on account of such brick so furnished and used."

"3. If the court, sitting as a jury, believes and finds from the evidence that the press brick machine mentioned in the second count of the petition, was bought by defendant, the Gratiot Brick and Quarry Company, from plaintiff, under contract, dated August 5, 1895, read in evidence, and that the same was placed and put up by said defendant in the one and two story frame building, marked 'press-room' on the plat made by Von Borcke, read in evidence, then on the premises of said defendant; that the said machine was not used in the erection of said building, nor contemplated in the erection thereof, but said building was an old structure, or one that was already existing and standing on said property when defendant acquired the same; that said building was not put up or erected by defendant, but, so being and existing on the ground, was used and employed by defendant to house said press brick machine; then the court declares the law to be that plaintiff is not entitled to maintain a lien for said machine against said building or the ground upon which the same is situated."

A personal judgment was entered by the court in favor of the plaintiff on both counts in the amounts claimed against Gratiot Brick and Quarry Company, but denying plaintiff a lien. After proper preliminary steps the plaintiff appealed to this court.

⁵¹¹ 1. The first instruction given for defendant is erroneous. The brick and the press brick machine were not contracted for on the same day, it is true, but they were bought and furnished as parts of one general improvement of the property. The brick was used in constructing the kilns, and the press brick machine was used in pressing the clay into bricks, which would be burned in the kilns. They were all necessary parts of one whole plant and were under a common roof, and the whole and all its parts were constructed at substantially the same time, and the business of making dry pressed brick could not be carried on until the whole plant was completed. They were all furnished to the owner of the property within the statutory period before the lien was filed. They must, therefore, be regarded as having been furnished under a single contract within the meaning of the mechanic's lien law: Page v. Bettes, 17 Mo. App. 366; Kearney v. Wurdeman, 33 Mo. App. 447; Kern v. Pfaff, 44 Mo. App. 35; Fulton Iron Works v. North etc. Min. Co., 80 Mo. 265; Grace v. Nesbitt, 109 Mo. 9.

2. The second instruction given for defendant should not have been given, because there is no evidence adduced in the

case to which it could apply. On the contrary, the evidence is uncontradicted that the kilns are a part of the plant and are not separate structures, complete in themselves.

3. The third instruction given for the defendant proceeds upon the idea that the building in which the press brick machine was placed was an old, existing, frame building, ⁵¹² which was simply used to house the machine, and therefore the plaintiff was not entitled to a lien for the machine.

In the determination of this case it is not necessary to decide what the true rule is as between a lienor and a tenant. This case is a controversy between the mechanic and the owner. Many of the cases cited by counsel are inapplicable because they arose between the mechanic and the tenant.

Phillips on Mechanics' Liens, third edition, section 177, says: "Fixtures, machinery, etc., when necessary to the original purposes of the structure and are erected with it, may become responsible to the lien, when they would not otherwise have been, without express enactment, if put up independently. As between the owner and mechanic, everything put into and forming a part of a building, or machinery for manufacturing purposes, and essential to the manufactory, is a part of the freehold; as wheels of a mill, the stones, and even the bolting cloth, a copper kettle or boiler in a brewhouse, when proved to be essential to the brewhouse, are subject to the mechanic's lien law. So a cooking range, and a cotton gin placed in a gin house. So the engine by which a steam sawmill is propelled is part of the building. Likewise millstones and machinery put up for a mill, fastened by screws and bolts. Electric poles, wires, lamps, etc., are fixtures and part of the realty. In the case of *Hutchins v. Masterson*, 46 Tex. 554, 26 Am. Rep. 286, it is said: 'The weight of the modern authorities establishes the doctrine that the true criterion for determining whether a chattel has become an immovable fixture consists in the united applications of the following tests: 1. Has there been a real or constructive annexation of the article in question to the realty? 2. Was there a fitness or adaptation of such article to the uses or purposes of the realty with which it is connected? 3. Whether or not it was the intention of the party making the annexation that the chattel should become a permanent accession to the freehold, this intention being inferable from the nature of the article, the ⁵¹³ relation and situation of the parties interested, the policy of the law in respect thereto, the mode of annexation, and purposes or use for which the

annexation is made. And of these three tests pre-eminence is to be given to the question of intention to make the article a permanent accession to the freehold, while the others are chiefly of value as evidence as to this intention.' ”

Section 6705 of the Revised Statutes of 1889 provides: “Every mechanic or other person who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler, or machinery for any building, erection, or improvements upon land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or subcontractor, upon complying with the provisions of this article, shall have for his work or labor done or materials, fixtures, engine, boiler, or machinery furnished, a lien upon such building, erection, or improvements, and upon the land belonging to such owner or proprietor on which the same are situated, to the extent of one acre,” etc.

The intention of the law is to give a lien where the machinery furnished is intended by the owner to become a part of the building, manufactory, or plant, and it is immaterial whether this occurs when the building was originally constructed or when the owner converts an existing building into a manufacturing plant. The intention of the owner is just as clearly expressed by his acts in the one case as in the other, and his obligation to the person furnishing the machinery is the same in morals and in law in the one case as in the other. Any other construction would be a denial of the benefits intended to be conferred by the statute. There can be no reason for giving a lien for machinery furnished to and that becomes a part of a new building, and denying a lien where the machinery is furnished after the building is completed, but when it is converted from a store or residence into a manufacturing plant and the machinery is essential to ⁵¹⁴ its changed character and use. For the statute intended to secure the person whose labor or materials or machinery goes into the building or erection and enhances the value of the land, and the same reason which would deny a lien for machinery put into an existing building would also deny a lien for the labor or materials used in reconstructing a building. Moreover, if this were the true rule, a merchant would be safe in selling an owner machinery for an original construction, but would not be safe in selling the same article to go into an existing building that the owner desired to convert into a factory, although the intention of the owner in buying the machinery is the same in both instances.

Much of the confusion that is found in cases of this character arises from a failure to observe the intention of the owner, and in laying a stress, which the statute does not warrant, upon the character of the machinery that is put into the building. Of course, there is no lien on the house or land given by the statute for any kind of machinery that is simply stored in the house awaiting sale or for any temporary purpose, nor can there be a lien where a tenant puts in machinery under a lease which reserves to him a right of removal, for in such cases the chattel never becomes a part of the realty, but if the machinery is put into a building by the owner with the intention of making it a permanent part of the building, then the person furnishing the machinery is entitled to a lien on the building and it is then wholly immaterial when the machinery is so put in the building, whether at the time it was originally constructed or at any time afterward.

The cases heretofore decided by this court, when read in the light of the facts before the court, will be found to be in harmony with what is here said.

In *Graves v. Pierce*, 53 Mo. 423, it appeared simply "that the said machinery is now in a building claimed by said Pierce and situated on a lot of ground containing about one acre," etc. The machinery consisted of three sets of carding ⁵¹⁵ machines. It did not appear that they were attached in any way to the building, and the court said: "Carding machines are not usually affixed to the freehold or realty. They are manufactured and sold as are all articles of merchandise, and are placed in a building for use, and braced or otherwise stayed, so as to hold them steady for use, and are taken down and removed to another building, when it becomes necessary by sale or otherwise, without injury to the building in which they are placed." Of course, the lien was denied the plaintiff on this showing.

In *Thomas v. Davis*, 76 Mo. 72, 43 Am. Rep. 756, the machinery in question was a steam-engine and accompanying apparatus, put in the building by the owner, and the whole was intended and adapted for the business of lead smelting. The controversy arose between two mortgagees. The plaintiff's mortgage described the land only, while that under which the defendant acquired title not only described the land but also specifically mentioned "furnaces, engines, boilers, and machinery" situated on the land. Thus the question was squarely presented, for if the machinery had not become a part of the realty, the first mortgagee had no title, and the second mort-

gagee would have the better right because his mortgage covered not only the land but the chattels.

This court, after saying that the rule as between mortgagor and mortgagee is the same as the rule between heir and executor, said: "In *Fisher v. Dixon*, 12 Clark & F. 312, cited by Mr. Hill, the house of lords held that: 'When the absolute owner of the land in fee, for the purpose of better using the land, erects upon and affixes to the freehold certain machinery, such as is in use in making coal, and in mines, it will go to the heirs as part of the real estate; and if the corpus of such machinery belongs to the heirs, all that belongs to the machinery, although more or less capable of being detached and being used in such detached estate, from it, must be considered as belonging to the heirs.' In *Mather v. Frazier*, 2 ⁵¹⁶ Kay & J. 536, also cited by Mr. Hill, Vice-Chancellor Wood held that: 'Even in regard to manufacturers, all articles affixed to the freehold, whether by screws, solder, or any other permanent means, or by being let into the soil, will descend to the heirs, or pass by conveyance of the land; that the rule of law by which fixtures are held less strictly, when erected for manufacturing purposes, has no application to fixtures erected by the owner of the land in fee.' It is held in New York that, as between mortgagor and mortgagee, whatever is annexed or affixed to the freehold, by being let into the soil, or annexed to it, or to some erection upon it, to be habitually used there, particularly for the purpose of enjoying the realty, or some profit therefrom, is a part of the realty." And the court further said: "Some of the exceptional cases seem to have made the question depend upon the character of the fastening, whether slight or otherwise. But this is a criterion of questionable character, not sustained by the weight of the decisions. More depends upon the nature of the article and of its use as connected with the use of the freehold." And again, speaking of the difference between chattels put on the land by a tenant and those put thereon by the owner of the fee the court said: "He [the owner] has absolute dominion over the property, both real and personal, and his intention in making the annexation is to be determined by the consideration of the character of the annexation, and its appropriation or adaptation to the use or purpose of that part of the realty with which it is connected." Accordingly, the court held the steam-engine and apparatus to be a part of the realty and as such subject to the first mortgage.

This case is valuable for another reason. The house was a frame building which was suitable only for a covering for the machinery which was placed in it. The machinery was manifestly of much greater value than the house. The whole was intended and adapted for the business of lead ⁵¹⁷ smelting. Being so intended and used, the whole became realty. Much confusion has been caused by courts paying too much regard to the relative value of the house and of the machinery which is placed in the house. There can be no rule or principle deduced from such considerations. In nearly all manufacturing establishments the machinery costs many times as much as the house in which it is located, for palaces are not generally suitable as workshops. The intention of the owner is the first and best criterion, and the adaptability of the machinery to the uses and purposes to be subserved is the next best test, in determining all cases of this character.

Richardson v. Koch, 81 Mo. 264, was a case where the tenant put the machinery in a building on the land, which by the terms of the lease the tenant had a right to remove at any time, and it was properly held that by the terms of the contract the chattels never became a part of the realty, for there was disclosed a manifest intention that they should not become so, and, moreover, neither the building nor the machinery was put on the land by the owner, and, of course, the tenant's act could not give the mechanic a lien on the owner's land. The tenant could give the mechanic no greater right than he possessed himself. It is plain, therefore, that this case was properly decided. But there is some language in the opinion about the house being on the land before the machinery was put in it, and about it being possible to separate the house and the machinery without damage to either, and about the building being more essential to the machinery than the machinery is to the house, and that the building simply served to house the machinery, which was not necessary to the decision of that case and which, as is hereinbefore shown, is not the true test in such cases, and is therefore not to be followed in other cases.

In Springfield Foundry etc. Co. v. Cole, 130 Mo. 1, the machinery was put on the realty under a contract with a company ⁵¹⁸ that did not have even a leasehold, but that simply had the consent of the owner of the land to mine for zinc and lead, and it was properly held that the machinery was a mere trade or manufacturing fixture, which the owner of the

land never acquired any title to, and, of course, the owner's land could not be charged with a lien for such machinery.

The putting a press brick machine in a residence or a church or an ordinary store would not entitle a person to a lien on the building and land therefor, because it would be plain that it was not adapted to use in such a building, and hence there could be deduced no intention to make such a machine a part of the house. But the contrary is true of a furnace put in such a building to keep it warm, and hence a lien would be allowed: *Goodin v. Elleardsville Hall Assn.*, 5 Mo. App. 289; *Cooke v. McNeil*, 49 Mo. App. 81.

The converse of the proposition is equally true, machinery put in a manufacturing plant that is plainly (or proved to be) suitable for the transaction of the business to be carried on in the house, entitles the person furnishing it to a lien, and it is wholly immaterial what the relative value of the house and the machinery may be, or whether they can be separated easily or not. A few cases will suffice to illustrate the rule: A copper kettle in a brewhouse: *Gray v. Holdship*, 17 Serg. & R. 413, 17 Am. Dec. 680; a steam-engine in a tannery: *Oves v. Oglesby*, 7 Watts, 106; engine and boiler in a manufacturing plant: *Shepard v. Blossom*, 66 Minn. 421, 61 Am. St. Rep. 431; gas compressors and engine in a brewery: *Watts-Campbell Co. v. Yuengling*, 125 N. Y. 1; engine in a sawmill: *Morgan v. Arthurs*, 3 Watts, 140; wheels and boxes for use in a dry kiln: *Meek v. Parker*, 63 Ark. 367, 58 Am. St. Rep. 119; steel tanks forming part of a wood-vulcanizing plant: *Haskin Wood-Vulcanizing Co. v. Cleveland Shipbuilding Co.*, 94 Va. 439; bolting cloth in a flourmill: *Heidegger v. Atlantic Mill Co.*, 16 Mo. App. 327.

⁵¹⁹ In the case at bar, it is too plain to admit of debate, and in fact is admitted, that the intention of the owner was to construct and erect a dry press brick plant, and that the several parts and the machinery were all necessary to form one complete manufacturing establishment, which would not subserve the purposes intended if any one of the parts was omitted, and that the whole was manifestly adapted to those uses and purposes. The machinery, therefore, became a part of the realty and the buildings, erections, and improvements on the realty became subject to a mechanic's lien for the machinery furnished as the statute provides in such cases. The bricks went into the kilns, which formed a necessary part of the plant; and hence the plaintiff became entitled to a lien for them also.

The fact that the several parts were separate, except for the roof which covered them, makes no difference, for from the nature of the plant it was necessarily made up of parts, their sum going to make up the unit—the manufacturing plant. And the further fact that the parts were located upon different platted lots is likewise immaterial, for the owner had obliterated the lot lines, and by his use of the property had treated the whole as one lot, and the parts as one plant and therefore the law will treat it as such: *Meinholz v. Grodt*, 4 Mo. App. 568; *Kemper v. King*, 11 Mo. App. 116; *Wolfort v. St. Louis*, 115 Mo. 144; *Lindsay v. Gunning*, 59 Conn. 296; *Lauman's Appeal*, 8 Pa. St. 473; *Bodley v. Denmead*, 1 W. Va. 249; *Edwards v. Derrickson*, 28 N. J. L. 39; *Linden Steel Co. v. Rough Run Mfg. Co.*, 158 Pa. St. 238; *Salt Lake Lithographing Co. v. Ibex Mine etc. Co.*, 15 Utah, 440, 62 Am. St. Rep. 944; *Premier Steel Co. v. McElwaine-Richards Co.*, 144 Ind. 614; *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200.

It follows that the court should not have given the third instruction asked by the defendant, but should have given the instruction asked by the plaintiff and refused by the court, as under the facts here presented it stated the law correctly.

⁵²⁰ The plaintiff is entitled to a lien as prayed, which will be subordinate to the first mortgage, and the lien will take priority over the second mortgage and over the rights of the assignee: *Schulenburg v. Hayden*, 146 Mo. 583.

The judgment is reversed and the cause remanded with directions to the circuit court to enter judgment for the plaintiff establishing its mechanic's lien, as above indicated.

All concur except Valliant, J., not sitting.

MECHANIC'S LIEN—SEVERAL HOUSES ON DIFFERENT LOTS.—A general lien for several houses on different lots is good if the labor and materials are furnished under a single contract: *Notes to Meek v. Parker*, 58 Am. St. Rep. 124; *Johnson v. Salter*, 68 Am. St. Rep. 521; *Lyon v. Logan*, 68 Tex. 521, 2 Am. St. Rep. 511. For a discussion of this matter, see monographic note to *Pacific etc. Mill Co. v. Bear Valley Irr. Co.*, 65 Am. St. Rep. 165, on when a mechanic's lien may, or must, include property in addition to that upon which the work was performed, or the materials furnished. A claim of lien can be filed and asserted upon several disconnected buildings without there being any account of the amount of materials furnished each, when they constitute part of the plant used in the business of smelting, and are situated upon the same piece of ground: *Salt Lake etc. Co. v. Ibex Mine etc. Co.*, 15 Utah, 440, 62 Am. St. Rep. 944.

MECHANIC'S LIEN—CHARACTER OF STRUCTURE SUBJECT TO.—If a structure is of a substantial and permanent character and may, in any reasonable sense, be known as a building,

it may be encumbered by a mechanic's lien: *Wheeler v. Pierce*, 167 Pa. St. 416, 46 Am. St. Rep. 679, and note showing that the word "building" includes a structure designed for the sheltering of property.

MECHANIC'S LIEN—MACHINERY—FIXTURES.—A mechanic's lien can attach only for material or work which has become a permanent part of the building or structure: *Patterson v. Gallagher*, 25 Or. 227, 42 Am. St. Rep. 794. The furnishing of machinery for the operation of a manufactory, or for manufacturing purposes, and put into a building, does not ordinarily give a lien for "materials" furnished upon the building to which it is attached: See monographic note to *Chapin v. Persse etc. Paper Works*, 79 Am. Dec. 275, upon the lien of materialmen; *East Tennessee Iron Mfg. Co. v. Bynum*, 3 Sneed, 268, 65 Am. Dec. 56. But the statute may give a lien for machinery furnished, and, when it does, it includes machinery for a building already built, as well as one in process of erection, but the machinery must have become a fixture in the building: Note to *Chapin v. Persse etc. Paper Works*, 79 Am. Dec. 276.

FIXTURES—MACHINERY—RULE FOR DETERMINING.—The intention of the owner in attaching machinery to land must be considered in deciding whether or not it becomes a fixture; and, if it appears that he attached it with a view to its remaining permanently, it must be treated as real estate. His intention is to be inferred from the nature of the article fixed, the relation and situation of the party making the annexation, the structure and mode of annexing, and the purpose for which the annexation has been made: *Roseville etc. Min. Co. v. Iowa Gulch Min. Co.*, 15 Colo. 29, 22 Am. St. Rep. 373. See, also, *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 53 Am. St. Rep. 846; *Feder v. Van Winkle*, 53 N. J. Eq. 370, 51 Am. St. Rep. 628.

INSTRUCTIONS—EVIDENCE.—It is not error to refuse an instruction when there is no evidence to which it is applicable: Note to *Negley v. Cowell*, 51 Am. St. Rep. 347. See, also, *Corniff v. Cook*, 95 Ga. 61, 51 Am. St. Rep. 55; *Louisville etc. R. R. Co. v. Markee*, 103 Ala. 160, 49 Am. St. Rep. 21.

ST. LOUIS FAIR ASSOCIATION v. CARMODY.

[151 MISSOURI, 566.]

GAMING—BETTING ON HORSERACES—BOOKMAKING AND POOLSELLING.—Betting on a horserace is gambling, and bookmaking and poolselling are each betting upon a horserace or particular event upon which they are made or sold.

GAMING — BETTING ON HORSERACES — GAMBLING HOUSE, WHAT IS.—The keeping of a gaming-house, furnished with means and facilities for gambling, to which the public is tempted, invited, or permitted habitually to attend for the purpose of gambling, whether by betting on a horserace in sight, or at a distance, is the keeping of a common gambling-house.

HORSERACING AND FURNISHING REFRESHMENTS AS A LAWFUL BUSINESS.—It is not unlawful to keep a race-track, and to induce horseraces thereon by giving prizes to the winners; nor is it unlawful, under license, to provide stands to

dispense refreshments to persons attending the races, making it more attractive to patrons of the racetrack, provided there is no ulterior consideration, of an unlawful character, entering into the transaction.

CONTRACTS DESIGNED TO PROMOTE A BUSINESS PARTLY UNLAWFUL ARE ILLEGAL.—If parties make a contract in contemplation of a business which one of them is to conduct, part of it being lawful and the other part unlawful, and the subject of the contract is a feature of the business, and designed to promote it, the contract is unlawful.

CONTRACTS TO AID UNLAWFUL ACTS OF A THIRD PERSON ARE ILLEGAL.—A contract lawful in itself cannot be rendered unlawful by the act of a third person converting the subject of the contract to an unlawful purpose, but if a contract, apparently lawful, is made with a view of facilitating or encouraging the unlawful act of a third person, it is unlawful. It is not the unlawful use to which the subject of the contract is liable to be put, but the intention of the parties that it be so used which vitiates the contract.

CONTRACTS TO FURNISH REFRESHMENTS AT GRAND STAND ON RACECOURSE, WHEN ILLEGAL.—While it is lawful for a racetrack association to keep a racetrack and grand stand, yet, if it adds to these an unlawful business, such as gambling booths, which form a part of the racetrack scheme, where books are made and pools are sold upon the races, from which the association derives a revenue for bookmaking, and the unlawful branch of the business is conducted together with the lawful branch of it, a contract whereby the association sells the privilege of furnishing cigars, liquors, and other refreshments in and about its grand stand, is founded upon an unlawful consideration, is against public policy, and is invalid, where the object of providing the refreshments is in aid of the racetrack scheme.

CONTRACTS TO FURTHER PURPOSE OF GAMBLING HOUSE ARE ILLEGAL AND NOT ENFORCEABLE.—Any contract made in furtherance of the purpose for which a gambling house is kept, or to render it more tempting or attractive to the public, who would patronize it for that purpose, is illegal, and courts will not enforce it.

CONTRACTS — VALIDITY OF, HOW DETERMINED, WHERE BUSINESS IS PARTLY UNLAWFUL.—If the business of a racetrack proprietor has two branches, one lawful and the other unlawful, and the subject of a contract in suit, respecting the business, relates as well to one branch as to the other, a court, in determining the validity of the contract, will leave out of view its relation to that part of the business which is lawful and consider it only in its relation to the unlawful branch.

Chester H. Krum and Frank K. Ryan, for the appellants.

Boyle, Priest & Lehman and Valle Reyburn, for the respondent.

568 **VALLIANT, J.** This is a suit on a bond. The petition alleges that on May 1, 1896, plaintiff sold to defendant Carmody the privilege of selling refreshments in its grand stand for a period of forty-nine days, beginning May 6, 1896, for the sum of sixteen thousand seven hundred and nine dollars,

to be paid in stated installments during that period; that the bond in suit was given to secure those payments; that Carmody paid ten thousand two hundred and sixty-four dollars and forty-three cents, leaving a balance of six thousand four hundred and forty-four dollars and fifty-seven cents unpaid, for which this suit is brought.

Defendants answered admitting the execution of the bond, and pleaded certain facts by way of avoidance, whereupon the plaintiff moved the court for a judgment for the amount sued for on the pleadings, which motion the court sustained, and rendered judgment accordingly, from which judgment the defendants, after proper course, appealed to this court.

The question on this record is, Taking the defendants' answer to be true, is the plaintiff entitled to a judgment? That portion of the answer to be considered is as follows:

"Further answering, the defendants state that the said plaintiff ought not to have and maintain its action, for that the contract first alleged in said petition and the writing obligatory therein declared on were, and are, based upon an ⁵⁰⁹ illegal consideration, and are, and were, at the time of their execution, void and of no effect, in that, at the time when the said contract and said writings obligatory were executed and continuously down to the expiration of the period of time by them covered, the said plaintiff was engaged in maintaining, operating, and controlling a racetrack in the city of St. Louis, on which said racetrack, as part thereof, was, and is, situated the grand stand specified in said petition; that on said racetrack during the said period there were conducted by said plaintiff, from day to day, Sundays excepted, horseraces for purses offered and paid to the winners by said plaintiff; that upon the said racetrack so operated, controlled, and conducted by said plaintiff, persons were admitted and permitted by said plaintiff to attend for the purpose of gambling and betting upon the result of the said horseraces so conducted; that said persons attended upon the said horseraces in large numbers and gambled and bet upon said races large sums of money with the consent, connivance, and procurement of the said plaintiff; that the furnishing of liquors, refreshments, and cigars by the defendant, Patrick J. Carmody, under the said agreement first alleged in said petition, was contracted for by the said plaintiff by reason of the contemplated attendance of said persons for the purpose and with the expectation of gambling upon the said racetrack of said plaintiff, and that such refreshments, cigars, and liquors,

as were furnished by defendant, Patrick J. Carmody under the said agreement, were so furnished by reason of the attendance upon the said racetrack of large numbers of persons for the purpose of gambling and betting upon the said races there maintained and conducted; that the proceeds of the privilege to sell liquors bought by said defendant Carmody were used by said plaintiff in making up and paying the purses raced for upon it, said racetrack as aforesaid, and in defraying the expenses of conducting its racetrack; that all necessary appliances, apparatus, records, and paraphernalia for betting ³⁷⁰ and gambling were provided and permitted to be used for such purposes by the said plaintiff upon its racetrack, to wit, in the same grand stand and houses and buildings appurtenant thereto; and that the grand stand of the said racetrack and the appurtenances thereunto belonging constituted and were during the period covered by said agreement, a common gaming-house and public nuisance conducted, maintained, and permitted by the said plaintiff; in that the said plaintiff in a building covered with a roof and inclosed at the sides, adjacent to, and connected with said grand stand, provided stands and booths for the occupancy of gamblers, bookmakers and poolsellers, who occupied the same and offered odds upon the races run on the racetrack of plaintiff and accepted bets made thereon by the said persons attendant as aforesaid upon the said races; that the privilege of making books, by which is meant taking and receiving bets by the said gamblers occupying said booths and stands, was sold by the plaintiff to some gambler, or gamblers, who in turn sublet the privilege to many other gamblers, and the proceeds of the sale of said privilege and of the privileges granted said Carmody and others were used by said plaintiff in making up and paying said purses and defraying the expenses of its said racetrack; and that the said attendants upon the said racetrack assembling there as aforesaid for the purpose of gambling, bet against the said bookmakers, who posted odds at which such bets were taken upon a board, and device, and erected by them upon their respective stands and booths, and who recorded said bets upon sheets and books kept by them and upon tickets issued by them to the said respective betters; the said bookmakers and gamblers thereby, by reason of the premises aforesaid, setting up, maintaining, and conducting gambling devices upon the said premises of said plaintiff with its knowledge, connivance, participation, and consent; and the said agreement and said writings obligatory sued on herein were made and executed

with reference to and by reason of the ³⁷¹ said unlawful transactions had and to be had upon the said premises of said plaintiff, and the said sum and sums of money agreed by said defendant Carmody to be paid, and such sum or sums as were paid by him under said contract for the privilege aforesaid were necessary to be used, and as paid were used, by the plaintiff in supplying, operating, and maintaining the gambling devices hereinbefore specified, without which said devices, appurtenances, and paraphernalia, the said business of gambling could not have been carried on or maintained by said plaintiff; that the privilege so acquired by said Carmody is the same as is set forth in said petition, and the money agreed to be paid by said Carmody was in connection with and for the maintenance of said common gaming-house as aforesaid, and is the same consideration that is mentioned in said contract referred to in said petition."

There were other facts pleaded by defendants, but the counsel on both sides have limited their discussion to the question as to the sufficiency of the facts stated in that portion of the answer above quoted, and we will follow their suggestion.

Under the law of this state it is not unlawful to keep a racetrack, and to induce horseraces thereon by giving prizes to the winners. And it is not unlawful, under license, to provide stands to dispense refreshments to persons attending the races, making it more attractive to patrons of the racetrack, provided there is no ulterior consideration entering into the transaction of an unlawful character. But betting on a horserace is gambling: *Shropshire v. Glascock*, 4 Mo. 536, 31 Am. Dec. 189; *Boynton v. Curle*, 4 Mo. 600; *Hayden v. Little*, 35 Mo. 418. And keeping a gaming-house furnished with the means and facilities for gambling to which the public is tempted, invited, or permitted habitually to attend for the purpose of gambling, whether it be by betting on a horserace in sight, or at a distance, is the keeping of a common gambling-house within the meaning of the law: *Bollinger v. Commonwealth*, ³⁷² 98 Ky. 574; *People v. Weithoff*, 51 Mich. 203, 47 Am. Rep. 557. In the former case just cited, the court of appeals of Kentucky said: "That a house where persons are permitted habitually to assemble to bet and win or lose money, whether with each other or with the owner, or whether on result of a horserace or turn of a playing card, is, in meaning of the law, a gaming-house, and, therefore, a common nuisance, is too well settled and plain for discussion." And in the Michigan case Judge Cooley said:

"The characteristics of such a room must be readily apprehended and understood. If the room is one whose use is intended to facilitate gaming operations and where sporting characters are invited to congregate for purposes of illegal amusement and gain, and to stake money or other thing of value upon trials of chance, skill, or endurance, we seem to have everything necessary to constitute a gaming-room."

In *Swigart v. People*, 154 Ill. 284, the plaintiff in error was indicted and convicted of keeping a common gaming-house under a statute similar to ours. He was the secretary of the Garfield Park Club, which kept a racetrack near Chicago; a part of the revenue of the club was obtained from space and privileges rented to bookmakers and poolsellers. This space was located under the grand stand. It was covered, but open on the sides. The following are extracts from the Illinois court in that case: "That bookmaking and poolselling are each betting upon the horserace or particular event upon which they are made or sold, is not questioned. In the first, the betting is with the bookmakers; in the second, the betting is among the purchasers of the pool. . . . It is shown that large numbers of persons were present and permitted to assemble within said room during the racing season, who did bet upon the result of the races. . . . It is clear, therefore, that the room or space within the grand stand, within the inclosure of said Garfield Park Club, kept as we have seen, for the purpose of bookmaking and selling ³⁷³ of pools contingent upon the result of horseraces, the seller or buyer of the pools winning the money wagered upon the race or losing it, was a common gaming-house within the meaning of the statute. . . . That drawing together of large numbers of persons, from all classes of society, in and about the betting rooms and betting rings of the Garfield Park Club, so that they were brought into familiarity with gambling in its various forms as there practiced, was demoralizing, can admit of no question; and that the keeping of the places where persons were procured or permitted to assemble together for the purpose of betting and winning and losing money falls within both the letter and spirit of section 127 of the Criminal Code admits of no controversy."

The keeping of such a house being forbidden by law, any contract made in furtherance of the purpose for which it is kept or to render it more tempting or attractive to the public who would patronize it for that purpose is illegal and courts will not enforce it. It makes no difference how fair the contract may be

on its face, or how innocent in its own isolated terms, if it is designed to encourage an object forbidden by law, the courts will have nothing to do with it: *Downing v. Ringer*, 7 Mo. 585; *Ashbrook v. Dale*, 26 Mo. App. 649; *Friend v. Porter*, 50 Mo. App. 89; *Sprague v. Rooney*, 104 Mo. 358.

In the case last cited, this court per Sherwood, P. J., said: "If there be one principle of the law well settled it is this: . . . That the moment the illegality of the contract is disclosed the gates of legal and equitable relief and remedy are at once shut against the party who seeks to enforce such a contract."

The learned counsel for respondent, referring to the cases cited above, in their brief say: "The case at bar is very different from any of those. Here was a public race course, the maintenance of which was not in violation of law. Races may lawfully be run and purses may lawfully be paid ⁵⁷⁴ to winners. People may attend to witness races, and their attendance is not in violation of law. Betting upon these races is unlawful, but that does not interfere in the racing, and so the agreement to pay the purses would be enforced at the suit of the winners, because in that agreement there was nothing in contravention of law or public policy. Men are employed to care for the horses, blacksmiths are engaged to shoe them, but that there is betting upon the races does not taint their work with illegality. The contract with the defendant was for the right to sell refreshments upon the ground to whosoever desired them, not alone to those who attended for the purpose of wagering, but without regard to the purpose of their attendance."

But that statement does not compass the whole case. To it should be added that the betting booths were a part of the plaintiff's racetrack scheme, from which by sale, to be used for book-making, the plaintiff derived revenue, and that the object of providing refreshments was in aid of that scheme.

A scheme lawful in itself cannot be made a cover for one that is unlawful. The plaintiff's racetrack and grand stand were lawful to be kept, but when it adds to those the gambling booth, and runs them together, and then makes a contract that is appurtenant to either and appurtenant to both, courts will not entertain it merely because in its application it was not limited entirely to the unlawful purpose. "If the house in question had been opened and used for a double purpose, viz., as an honest social club for those who do not desire to play, as well as for the purposes of gaming for those who did, it would not the less be a house opened and kept for the purpose of gaming": *Jenks*

v. Turpin, L. R. 13 Q. B. Div. 505. See, also, White v. Wilson, 100 Ky. 367.

The argument on the part of respondent is that since the selling of refreshments on a racetrack is an act in itself ⁵⁷⁵ not unlawful, selling the privilege to do so is not unlawful, and, the contract of sale of the privilege being thus lawful as between the seller and the buyer, it is not rendered unlawful because some persons may see fit to bet on the races. There is no disputing of that proposition in the abstract, and it may be carried farther and this be added: That the contract under those circumstances would not be rendered unlawful although, at the time of making it, the parties knew that persons were liable to bet on the races. But if the parties made the contract in contemplation of the business the plaintiff was to conduct, both that which was lawful and that which was unlawful, and the subject of the contract was a feature of that business and designed to promote it, the contract is unlawful. A contract lawful in itself cannot be rendered unlawful by the act of a third person converting the subject of the contract to an unlawful purpose, but if the contract apparently lawful was made with a view to facilitate or encourage the unlawful act of a third person, it is unlawful.

In Michael v. Bacon, 49 Mo. 474, 8 Am. Rep. 138, relied on by respondent, the suit was on account for labor and material furnished in papering a house on Fourth street in St. Louis. The defense was, that the house was furnished for the purpose of using it for a gambling-house, and that plaintiff knew it. The court said that whilst there was evidence to show that plaintiff knew the purpose for which the house was intended, yet "there was no evidence that the plaintiff's purpose, in supplying the materials and fitting up the house, was that it should be used as a gambling-house," and held that he was entitled to recover. It is, therefore, not the unlawful use to which the subject of the contract is liable to be put, but the intention of the parties that it be so used that vitiates the contract. The court in that case refers to Pearce v. Brooks, L. R. 1 Ex. 213, and says of it: "The point made in that case was that a man who hired a brougham to a prostitute, knowing that she was a prostitute, and knowing that she intended ⁵⁷⁶ to use the brougham for purposes of display and attraction, could not recover for the hire, because such knowledge in that case amounted to an intention or design on his part to aid the prostitute in her illegal calling."

Since, as we have seen, the plaintiff's business as a racetrack proprietor has two branches, one lawful and the other unlawful, and since the subject of the contract in suit relates as well to the one branch as to the other, we are justified in leaving out of view its relation to that part of plaintiff's business which is lawful and consider it only in its relation to the unlawful branch. In that respect it is simply a contract of sale by plaintiff to defendant of the privilege of selling liquors, cigars, and other refreshments to the patrons of plaintiff's gambling-house during the racing season. In that aspect it is as much unlawful as if the keeper of a bawdy-house had sold the privilege to furnish refreshments to the patrons of her house. The law makes no difference in the two kinds of establishments. In the same section and in the very same sentence they are both condemned. Section 3811 of the Revised Statutes of 1889 is: "Every person who shall set up or keep a common gaming-house, or bawdy-house or brothel or house of assignation, shall, on conviction," etc.

The answer avers, and the plaintiff by its motion admits, that in connection with its racetrack and grand stand it has provided booths fitted up and supplied with all the gambling devices, appurtenances, and paraphernalia requisite for book-making, which it rented for money to gamblers to be used for that purpose in connection with the races to be run on its track, and by the consent, connivance, and procurement of plaintiff large numbers of people assembled at those booths to gamble by betting on the races, through the devices so supplied. According to all the authorities on the subject that have been brought to our attention, those facts constitute the plaintiff the keeper of a common gaming-house.

The answer further avers and the motion admits that the contract in suit was made with the design and purpose on the ⁵⁷⁷ part of both plaintiff and defendant of furnishing the liquors, cigars, and refreshments to the frequenters of the plaintiff's gambling-house while it was in operation.

Plaintiff deriving a portion of its revenue from the sale of these gambling booths, and making this contract in contemplation of the concourse of people to be tempted within its precincts, the natural inference is that its design was to make the place more attractive to its patrons by adding to the excitement of racing and gambling that of drinking the liquors and partaking of the other refreshments that the contract contem-

plated, the one excitement feeding the other, thus prospering the business of the gamblers, and enhancing the market value of the plaintiff's booths.

Counsel for appellant in their brief say: "Gambling upon a racetrack is only the most nefarious degree of gambling known to the vicious propensities of mortal men. It has no redeeming quality. It is degrading to the last degree. Its history is the abhorrent story of crime, defalcation, embezzlement, chicanery, deceit, and ruin. No court can regard with favor a litigant which sues to enforce a contract made to foster and encourage such a fatally destructive vice." The learned counsel express the truth with great force.

Upon the facts pleaded in the answer the contract in suit is founded on an unlawful consideration, is against public policy, and is invalid; the court erred in rendering judgment for the plaintiff on the pleadings. The judgment of the circuit court is reversed and the cause remanded to be tried in conformity with the law as herein expressed.

All concur.

HORSE RACING IS GAMING: See monographic note to *State v. Smith*, 33 Am. Dec. 135, on what is gaming. This note, however, cites some authorities to the contrary. Pools on horseraces are "games": *People v. Weithoff*, 51 Mich. 203, 47 Am. Rep. 557. Betting on a horserace is gaming: Notes to *People v. Weithoff*, 47 Am. Rep. 566; *Comly v. Hillegass*, 39 Am. Rep. 776.

GAMING-ROOM — HORSE RACING — BOOKMAKING AND POOLSELLING.—The holding of a meeting for the racing of horses in the ordinary manner does not render the association holding it guilty either of bookmaking or of poolselling: *People v. Fallon*, 152 N. Y. 12, 57 Am. St. Rep. 492; but a room, such as an ordinary poolroom, used to facilitate betting on horseraces, is a gaming-room: *People v. Weithoff*, 93 Mich. 631, 32 Am. St. Rep. 532.

ILLEGAL CONTRACTS—PUBLIC POLICY.—All gaming contracts may be properly held to be void: *Monroe v. Smelly*, 25 Tex. 586, 78 Am. Dec. 541; and a wager on a horserace is void as against morals and public policy: *Gridley v. Dorn*, 57 Cal. 78, 40 Am. Rep. 110. Contra, *Dunman v. Strother*, 1 Tex. 89, 46 Am. Dec. 97. If any part of a consideration is illegal, the whole contract is void as against public policy, even though the illegal act or promise is coupled with one which is legal, for illegal contracts cannot be divided and held valid in part and invalid in other parts: Note to *Handy v. St. Paul etc. Pub. Co.*, 16 Am. St. Rep. 699. An illegal contract cannot be divided and held valid in part when the inducement thereto and the sole object in view was the formation of an unlawful combination, which cannot be separated from the other parts of the contract, and leave any subject matter capable of enforcement: Note to *Emshwiler v. Tyner*, 69 Am. St. Rep. 365.

ENFORCEMENT OF ILLEGAL CONTRACTS.—An illegal contract cannot sustain an action: Note to *Bishop v. American Preservers' Co.*, 48 Am. St. Rep. 340. Courts cannot aid the enforce-

ment of contracts clearly illegal: *Wiggins v. Bisso*, 92 Tex. 219, 71 Am. St. Rep. 837. The law refuses to enforce illegal contracts from reasons of public policy, and it is immaterial at what stage of the case the illegality appears: *Camp v. Bruce*, 96 Va. 521, 70 Am. St. Rep. 873. A contract opposed to the public policy and laws of the state will not be enforced by the courts: *Rose v. Kimberly*, 89 Wis. 544, 46 Am. St. Rep. 855; and no contract can be maintained on a contract growing out of an illegal transaction: *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415.

CASES
IN THE
SUPREME COURT
OF
MONTANA.

STADLER v. FIRST NATIONAL BANK OF HELENA.

[22 MONTANA, 190.]

NEGOTIABLE INSTRUMENTS—STIPULATION FOR ATTORNEY FEE.—A note stipulating for the payment of an attorney's fee in case of suit thereon is not negotiable, under a statute providing that no note is negotiable which contains a condition not certain of fulfillment.

STATUTES ADOPTED FROM OTHER STATES.—If the legislature adopts a statute from another state, it must ordinarily be presumed to have adopted such statute with the interpretation theretofore given it by the courts of that state.

NEGOTIABLE INSTRUMENTS—STIPULATION FOR ATTORNEY'S FEE.—A provision in a note that it is negotiable at a particular bank is not a waiver of the effect of a stipulation for the payment of an attorney's fee in case of suit thereon which renders the note non-negotiable.

NEGOTIABLE INSTRUMENTS.—A note made negotiable at a particular bank, if negotiable at all, is also negotiable elsewhere.

NEGOTIABLE INSTRUMENTS—DISCOUNT—ESTOPPEL. The rule that if a bank discounts a note payable to a third person, and negotiable in bank, the maker is estopped to set up set-offs against it, applies only to a note negotiable at the bank discounting it.

NEGOTIABLE INSTRUMENTS—ASSIGNMENT—SETOFF. A statute providing that "an action by an assignee of a non-negotiable chose in action is without prejudice to any setoff or other defense existing at the time of or before notice of the assignment" does not enlarge a statute providing "that the indorsee of a non-negotiable written contract shall have all the rights of the assignor, subject to all equities existing in favor of the maker at the time of the indorsement," so as to permit the setoff against the assignee of a demand against the assignor arising intermediate the indorsement and notice thereof.

NEGOTIABLE INSTRUMENTS — INDORSEMENT — SET-OFF.—Under statutes making an indorsee of a non-negotiable con-

tract subject to all equities existing at the time of the indorsement, and providing that, in an action on such assigned contract, a demand existing against the party thereto at the time of the assignment and belonging to defendant in good faith before notice of the assignment must be allowed as a counterclaim. A demand cannot be set off against the assignee unless due at the time when the assignment is made, and notice is unnecessary to prevent the setoff of a demand becoming payable subsequently.

SETOFF.—TIME CERTIFICATES OF DEPOSIT by a maker of a non-negotiable note with the payee bank, whether due or not at the time of a transfer of the note to a third person, are not legal setoffs, if the note was not due when transferred.

SETOFF.—TIME CERTIFICATES OF DEPOSIT by the maker of a non-negotiable note with the payee bank cannot be set off in equity against the indorsee or assignee of the note, if they were not due at the time of the transfer, even if the payee bank was then insolvent.

SETOFF—INSOLVENCY.—Equitable setoff against the indorsee or assignee of a non-negotiable note before maturity, of demand deposits due from the payee bank cannot be allowed on the ground that, by reason of the bank's insolvency at the time of the transfer, the deposits were due without further demand, if the bank, though in fact insolvent, was still open transacting business, and paying its debts at maturity.

Cullen, Day & Cullen, for the appellants.

W. Wallace, Jr., and Carpenter & Carpenter, for the respondents.

200 **PIGOTT, J.** 1. The Butte bank acquired the six thousand dollar note of Stadler & Kaufman by indorsement, in the ordinary course of business, in good faith, for value, and before maturity; hence it is apparent that, if the note be commercial paper, the Butte bank acquired an absolute title thereto notwithstanding any defect in the title of the Helena bank (Civ. Code, secs. 4034, 4035); that is to say, the Butte bank took it free of, and discharged from, any defense legal or equitable, which existed as between the makers and the payee, and therefore the Butte bank would be entitled to a judgment for the full amount thereof, without reduction by reason of any setoff claimed by plaintiffs.

The contention of defendants is, that the note is negotiable, while plaintiffs insist that the agreement therein contained to pay attorney's fees in case of suit destroys the quality of negotiability otherwise possessed by it. It has been a much ²⁰¹ debated question whether such a promise is fatal to negotiability, and the courts are pretty evenly divided upon the subject. In this state, however, the matter was set at rest by the case of *Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Am. St. Rep.

461, the supreme court holding that an agreement like the one in the note of July 18th had no effect upon the negotiability of a bill of exchange; and such was the law in Montana, and such is now the rule of decision, unless the Civil Code, which became operative on July 1, 1895, worked a change. We think it did. Section 3991 of that code defines a "negotiable instrument" as "a written promise or request for the payment of a certain sum of money to order or bearer, in conformity to the provisions of this article." By section 3992, it "must be payable in money only, and without any condition not certain of fulfillment." By sections 3994 and 3996, the declaration is made that a negotiable instrument may give to the payee an option between the payment of the sum specified therein and the performance of another act; and that it may contain a pledge of collateral security, with authority to dispose thereof. Section 3997 is as follows: "A negotiable instrument must not contain any other contract than such as is specified in this article."

The note in the case at bar contains a promise to pay the sum of six thousand dollars; it contains, also, another contract, to wit, an agreement to pay reasonable attorney's fees in case of suit on the note, in violation of the mandatory and prohibitive language of sections 3992 and 3997. It contains a condition not certain of fulfillment, and also a contract to pay a sum of money, other than the six thousand dollars, if that condition should be fulfilled. We are satisfied that the note is a non-negotiable instrument, when the plain words and clear intent of the sections quoted are applied to its terms; nor is there want of direct authority for these views. The sections referred to were borrowed, word for word, from either the Civil Code of California or that of North or South Dakota—probably from that of California, whence we have adopted a large part of our statute law. The supreme court of California interpreted ²⁰² the provisions mentioned in *Adams v. Seaman*, 82 Cal. 636, decided January 29, 1890, and said: "These code provisions were evidently intended to remove, and they do remove, all doubt which conflicting judicial decisions had thrown over such questions as the one arising in the case at bar. Under them, an instrument is not negotiable if it have 'any condition not certain of fulfillment.' In the case at bar, the instrument, in addition to the main sum, which is to be paid absolutely, provides for another sum to be paid, not only upon the contingency of a suit being brought, but also upon the other condition of

the employment of an attorney. . . . An attorney's fee, no matter how estimated, was not to be paid unless 'suit be commenced or an attorney employed,' each being a 'condition not certain of fulfillment.' We think, therefore, that the instrument sued on was not, in the sense of current commercial paper, a negotiable promissory note." Among the subsequent cases approving *Adams v. Seaman*, 82 Cal. 636, may be cited *First Nat. Bank v. Babcock*, 94 Cal. 96, 28 Am. St. Rep. 94. In *Garretson v. Purdy*, 3 Dak. Ter. 178, decided November 13, 1882, the supreme court of Dakota announced the same doctrine. The supreme court of North Dakota in *First Nat. Bank v. Laughlin*, 4 N. Dak. 391, decided December 10, 1894, held to the same rule. The United States circuit court of appeals for the eighth circuit, on December 3, 1894, in the case of *Second Nat. Bank v. Basuier*, 65 Fed. Rep. 58, applied the same rule. In that case the notes, otherwise negotiable, contained a clause for the payment of exchange and costs of collection. After quoting the sections of the Compiled Laws of Dakota, of which the sections of our Civil Code referred to are copies, the court say: "It will be observed that the statute not only prohibits the insertion 'of any condition not certain of fulfillment' in a note or bill which is intended to be negotiable, but it further declares, in substance, that a note or bill 'must not contain any other contract' than a promise or request for the payment of a certain sum of money to order or bearer. Now, undoubtedly, the notes in suit, when fairly construed, do contain ²⁰³ an agreement on the part of the makers that, if any costs are incurred by the holder in the collection of the paper, they will pay such costs, whatever the same may be, in addition to the principal sum expressed on the face of the notes, and to this extent they contain a condition which the makers may or may not be called upon to fulfill, depending upon circumstances. . . . The foregoing interpretation of the phrase, 'with costs of collection,' which seems to us to be a reasonable and natural interpretation, brings the several notes in suit within the inhibitions of the Dakota statute, and will not permit them to be classified as negotiable instruments, according to the rule prescribed by the statute." The supreme court of South Dakota has likewise decided that a note, otherwise negotiable, but containing a promise to pay interest at the rate of ten per cent per annum unless the principal sum be paid when due, in which event eight per cent per annum only should be paid, is not negotiable, because the amount which might be

demanded thereon was not certain: *Hegeler v. Comstock*, 1 S. Dak. 138. This case was decided May 12, 1890. When a particular statute has been adopted by this state from the statutes of another, after a judicial interpretation (suited to our condition) has been placed upon it by the parent state, the courts of this state are bound by the interpretation of the courts of the state whence it was adopted, or will, at least, accord respectful consideration to such interpretation, and depart from it only for strong reasons, as was held in *Oleson v. Wilson*, 20 Mont. 544, 63 Am. St. Rep. 639; in other words, when a legislature borrows a statute from another state, the legislature will ordinarily be presumed to have adopted the statute with the interpretation theretofore given it by the courts of that state: *First Nat. Bank v. Bell etc. Min. Co.*, 8 Mont. 32; *Territory v. Stears*, 2 Mont. 324; *Lindley v. Davis*, 6 Mont. 453; *Stackpole v. Hallahan*, 16 Mont. 40; *Murray v. Heinze*, 17 Mont. 353; *State v. O'Brien*, 18 Mont. 1; *State v. Butte City Water Co.*, 18 Mont. 199, 56 Am. St. Rep. 574; *Largey v. Chapman*, 18 Mont. 563.

²⁰⁴ Defendants lay great stress upon the words, "negotiable and payable at the First National Bank of Helena," appearing in the note, and argue that, if it be conceded that the negotiability of a promissory note in the ordinary form would be destroyed by the provision regarding attorney's fees, nevertheless that provision has no such effect in the case of a note which contains an agreement that it shall be a negotiable instrument; and they invoke sections 4240, 4604, and 2204 of the Civil Code, which are as follows:

"Sec. 4240. Except where it is otherwise declared, the provisions of the last foregoing fifteen titles of this part, in respect to the rights and obligations of parties to contracts, are subordinate to the intention of the parties, when ascertained in the manner prescribed by the chapter on interpretation of contracts; and the benefit thereof may be waived by any party entitled thereto, unless such waiver would be against public policy."

"Sec. 4604. Anyone may waive the advantages of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

"Sec. 2204. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, subject, however, to the other provisions of this title."

They contend that, under these sections, the provision for the payment of reasonable attorney's fees, in case of suit on the note, does not destroy its negotiability. Counsel assert that in this note is an agreement by the parties that it shall be negotiable notwithstanding the provision for attorney's fees, and therefore, by virtue of sections 4240 and 4604, the provisions of sections 3991, 3992, and 3997 are subordinated to the intention of the parties as expressed in, and ascertained by, the note itself, and that such an agreement is a waiver in favor of the indorsee of any benefit to the makers on account of equities existing between them and the payee; in short, that the phrase "negotiable and payable at the First National Bank," is a contract to waive, and is a waiver of, the effect ²⁰⁵ of the stipulation for attorney's fees upon the negotiability of the note. We are unable to adopt the views of counsel. Conceding that the absence of the words "order" or "bearer," which are the usual badges of negotiability at common law as well as under the Civil Code, may be supplied by the declaration that the instrument is negotiable, yet it does not follow that counsel's position is tenable. Without the stipulation for the payment of attorney's fees, the note would be negotiable. Its character in that respect would not be affected by the superadded phrase "negotiable and payable" at the Helena bank, for it would still be negotiable elsewhere: *Wardell v. Hughes*, 3 Wend. 418. The intention to make a negotiable instrument was as much manifested by the promise "to pay to the order of," as by the words "negotiable at," the Helena bank. Repetition of the promise to pay to the order of the bank could not increase the negotiability of the paper, nor evince the purpose to waive the effect of the statutory requirement that an instrument, to be negotiable, must be free from any condition not certain of fulfillment, and free also from any contract other than such as is specified in the sections defining negotiable instruments. The word "negotiable" has no greater significance than have the terms usually employed to communicate the quality of negotiability, and thereby to distinguish commercial paper from other written promises or requests to pay money at all events, which are non-negotiable because they omit "order" or "bearer." We recognize the just rule laid down in *Mandeville v. Union Bank of Georgetown*, 9 Cranch, 9, that the bank which becomes the indorsee of and discounts a non-negotiable note made to a third person, containing the declaration that it is negotiable at the bank which discounts it, takes the instrument

discharged of any setoff between the maker and payee. This rule is based upon the doctrine of estoppel, for the court, through Mr. Chief Justice Marshall, held that whether the note was negotiable or not was entirely immaterial, and said: "By making a note negotiable in bank, the maker authorizes the bank to advance on his credit to the owner of the note the sum expressed on ²⁰⁶ its face. It would be a fraud on the bank to set up offsets against this note in consequence of any transaction between the parties. These offsets are waived, and cannot, after the note has been discounted, be again set up." Here the facts are different, as the note is declared negotiable, not at the Butte bank, but at the payee bank, and the principle which governed in the case cited is inapplicable.

2. The note is non-negotiable. It therefore becomes necessary to inquire into the title obtained thereto by the Butte bank, and for that purpose convenience may be attained by regarding the action as one brought by the Butte bank upon the six thousand dollar note, in which Stadler and Kaufman, as a copartnership and as individual persons, claim the right to set off deposits to their credit in the Helena bank. The Butte bank took the note subject to the provisions of section 1982 of the Civil Code, and of sections 571, 690-692, and 698 of the Code of Civil Procedure. Section 1982 provides that "a non-negotiable written contract for the payment of money or personal property may be transferred by indorsement in like manner with negotiable instruments. Such indorsement shall transfer all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the indorsement." Section 571 provides, in substance, that an action by the assignee of a non-negotiable thing in action "is without prejudice to any set-off or other defense existing at the time of, or before, notice of the assignment." By section 690, the defendant may plead a counterclaim, which, by section 691, "must tend, in some way, to diminish or defeat the plaintiff's recovery and must be one of the following causes of action against the plaintiff or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action: . . . 2. In an action on contract, any other cause of action on contract, existing at the commencement of the action." So much of section 692 as is pertinent reads: "But the counterclaim specified in subdivision ²⁰⁷ 2 of the last section

is subject to the following rules: 1. If the action is founded upon a contract, which has been assigned by the party thereto, other than a negotiable promissory note or bill of exchange, a demand, existing against the party thereto, or an assignee of the contract, at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of the assignment, must be allowed as a counterclaim to the amount of the plaintiff's demand, if it might have been so allowed against the party, or the assignee, while the contract belonged to him." Section 698 is as follows: "When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other."

The first position taken by plaintiffs is that a defendant who is sued by the assignee of a non-negotiable chose in action may, in virtue of section 571, interpose as defense, by way of setoff, a demand held by him against the assignor, and which came into existence after the making, and before notice to defendant, of the assignment—in other words, that until notice is given to him such assignment is not complete so as to prevent defendant, when sued by the assignee, from asserting, as setoff against the assigned claim, a demand against the assignor which arose subsequently to the date of the transfer.

As has been stated, when the note was transferred to the Butte bank, Stadler & Kaufman had on deposit in the Helena bank subject to check four hundred and thirteen dollars and thirty-seven cents, and Kaufman had on deposit in the same bank four thousand two hundred and forty dollars, which was payable on and after July 8, 1896, upon presentation of the certificate; Stadler and Kaufman each had then on deposit in that bank five thousand dollars, payable on and after November 6, 1896, upon presentation of the certificate representing the same. Plaintiffs argue that since notice of the assignment of the note was not given until September 8, 1896, which was after the Helena bank had suspended payment and had been taken charge of by the comptroller, ²⁰⁸ the Butte bank took the note subject to all rights of setoff existing in favor of plaintiffs and against the Helena bank on September 8, 1896; and that since the effect of the declared insolvency of the Helena bank was to cause debts owing by it, and for want of demand

not otherwise due, to become due and actionable instantly, the equitable right to set off the deposits was perfect on September 4th, when the bank closed its doors. They urge that the last sentence of section 1982 of the Civil Code, declaring that the indorsement of a non-negotiable contract shall transfer to the assignee the rights of the assignor subject to all equities and defenses existing in favor of the maker at the time of the indorsement, is enlarged, by the provisions of section 571 of the Code of Civil Procedure, so as to permit the assertion as a setoff of a demand against the assignor arising intermediate the indorsement and notice thereof.

We are unable to agree with the foregoing interpretation of sections 1982 and 571. The former makes general provision that the indorsement shall transfer all the rights of the assignor, subject to such equities and defenses as may exist in favor of the maker at the time of the indorsement; but it does not define or specify the equities and defenses which may be availed of by the maker of the contract. This section is found in that portion of the statutes treating of substantive law. Section 571 is part of the practice act, the chief purpose of which is to indicate the means whereby the rights created, declared, and limited in the Civil Code and elsewhere are to be enforced, and to prescribe the modes of procedure thought best adapted to accomplish the attainment of the end desired—the protection of those rights. Were there a mere verbal conflict between these sections, no reason occurs to us why section 571—which, as we shall see, does not profess to establish new rights, but only to declare the application of an old principle to new conditions—should control or enlarge the effect of section 1982. But, in either the interpretation or construction of statutes, consideration of the general scope and purpose of a particular code becomes important only as an ²⁰⁰ aid in the effort to ascertain the true intent and meaning of a statute contained in it; hence if, because of substantial inconsistencies between them, or for any reason, it should appear that section 571 was intended to enlarge or restrict, in respect of setoff, the effect of section 1982, the courts would be bound so to declare.

The sections are not in conflict, nor does one in any wise limit the operation of, or expand, the other. Section 571 is found in the chapter devoted to the subject "Parties to Civil Actions," and immediately succeeds the provision of section 570, to the effect that every action must be prosecuted in the

name of the real party in interest. Now, at the common law, the assignee of a non-negotiable contract could not maintain an action thereon in his own name, but only in the name of the assignor. The change in this respect brought about by section 570 was the reason for the enactment of section 571. In section 571, as in section 1982, no attempt is made to define "set-off"; the question as to what a setoff is and when it accrues are left to be answered by reference to, and the application of, other statutes and laws. It does not change the substantial rights of the parties, but, in the language of the opinion in *Beckwith v. Union Bank*, 9 N. Y. 211: "Section 112 was intended only to introduce such alterations in the mode of protecting them as were rendered necessary by the provisions of sections 111 and 113, which require in most cases the real party in interest to be the plaintiff. The first branch of the section will have its full and appropriate meaning if we regard it as providing that, 'in the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any setoff or other defense existing at the time of, or before notice of, the assignment,' which would have been available to the defendant had the action been brought in the name of the assignor. In other words, the provision is that the substantial rights of the defendant shall not be affected by the substitution of the assignee as plaintiff in place of the assignor." Section 112 of the Code of New York of 1849, referred to in the quotation, is identical with section ²¹⁰ 571 of the Code of Civil Procedure, and sections 111 and 113 are similar to section 570 of the Code of Civil Procedure. To the same effect is *Myers v. Davis* (1860), 22 N. Y. 489, where the court said: "The alteration of the practice allowing the beneficial owner of a chose in action, not negotiable at law, to sue thereon in his own name, does not change the actual rights of the parties to any assignment of it. The defendants in this action are therefore entitled to the same defense which they would have had if the former rule had continued to prevail, and this action had been brought in the name of Watrous and Lawrence (assignors), and to no other or different defense. The assignee would have been protected in his equitable rights, notwithstanding the non-negotiable nature of the contract, to the same extent that he is entitled to have them protected now that he can prosecute in his own name. The change effected by the code is simply as to the form in which the action is to be carried on." *Martin v. Kunzmüller* (1867), 37 N. Y. 396, and a multitude of

other decisions, have been rendered in approval of the foregoing interpretation, which we deem unnecessary to cite, for this construction is now firmly established. In Pomeroy's Code Remedies, at section 156, it is said that this construction is now universally, as well as firmly, established. That it is firmly established is apparent, but that it is universal is not strictly accurate, for the supreme court of California in *McCabe v. Grey*, 20 Cal. 509, and in *St. Louis Nat. Bank v. Gay*, 101 Cal. 290, and the supreme court of Arizona (Jan. 26, 1892) in *Martin v. Wells*, 28 Pac. Rep. 598, and perhaps other courts, seem to have entertained a contrary view of the meaning of sections identical with section 571.

We must therefore turn to other provisions of the law in order to ascertain what a setoff is and when it may be allowed as against the assignee of a contract. "Setoff" *ex vi termini* implies reciprocal demands existing between the same persons at the same time, as is substantially expressed in section 698 of the Code of Civil Procedure. By section 1982, the indorsement of a contract not negotiable transfers to the assignee the title of the assignor, subject to all equities and defenses existing in favor of the ²¹¹ maker of the contract at the time of the indorsement, and the design of the provision is explained and its effect defined, as to setoff, by section 692, which treats particularly of and is devoted to counterclaims, including setoffs. Subdivision 1 of section 692 is, in substance, subdivision 8 of section 18, at page 366, of the Revised Statutes of New York of 1867, in force in that state ever since the year 1847, and perhaps from an earlier date. Said subdivision 1 is a copy of subdivision 1 of section 502 of Throop's Annotated Code of Civil Procedure of New York of 1888, and is also identical with subdivision 1 of section 502 of Stover's New York Annotated Code of Civil Procedure of 1897. The courts of New York are practically unanimous in holding that, while notice of assignment is required to cut off other defenses in favor of the defendant and against the assignor, it is not necessary with respect to setoff, either at law or in equity; that a demand against the assignor, to be a setoff at law, must exist in the form of a debt due and payable from the assignor at the date of the transfer, and that a debt owing by the assignor, not then due and actionable, but which becomes so prior to notice of the transfer, is not a legal setoff; and that, to be available against the assignee, the equitable right to a setoff must attach at the time of the transfer and cannot arise afterward: *Watt v. Mayor etc.*

(1847), 1 Sandf. 23; *Wells v. Stewart* (1848), 3 Barb. 40; *Bradley v. Angel* (1850), 3 N. Y. 475; *Beckwith v. Union Bank* (1851), 4 Sandf. 604; *Myer v. Davis* (1860), 22 N. Y. 489; *Martin v. Kunzmuller* (1867), 37 N. Y. 396; *Perry v. Chester* (1873), 53 N. Y. 240; *Taylor v. Mayor etc.* (1880), 82 N. Y. 11; *Munger v. Albany City Nat. Bank* (1881), 85 N. Y. 580; *Fera v. Wickham* (1892), 135 N. Y. 223. See, also, *Harrisburg Trust Co. v. Shufeldt*, 87 Fed. Rep. 669. The supreme courts of Missouri, Wisconsin, and Ohio, in *Huse v. Ames*, 104 Mo. 91, *Kinsey v. Ring*, 83 Wis. 536, and *Fuller v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 312, and other courts adhere to the same doctrine. Upon this subject Mr. Pomeroy in section 163 of his work on Code Remedies, says:

212 "The assignee takes the demand assigned subject to all the rights which the debtor had acquired prior to the assignment, or prior to the time when notice was given, if there was an interval between the execution of the transfer and the notice; but he cannot be prejudiced by any new dealings between the original parties after notice of the assignment has been given to the debtor. When two opposing debts exist in a perfect condition at the same time, either party may insist upon a setoff. If, therefore, the holder of such a claim, already due and payable, assign the same, and the debtor, at the time of the transfer, holds a similar claim against the assignor, which is also then due and payable, he may set off his debt against the demand in the hands of the assignee. If, however, the assignment is made before the opposing demand becomes mature, and the latter does not thus become actually due and payable until after the transfer, the debtor's right of setoff is destroyed by the mere fact of the assignment, and no notice thereof to him is necessary to produce that effect. The following special rule also exists under the peculiar circumstances mentioned: If an insolvent holder of a claim not yet matured assigns the same before maturity and the debtor, at the time of this transfer, holds a similar claim against the assignor, which is then due and payable, his right of setoff against the assignee, when the latter's cause of action arises, is preserved and protected. This latter doctrine is based upon considerations of equity, and is intended to prevent one party from losing his own demand on account of the insolvency of his immediate debtor, and from being at the same time compelled to pay the debt originally due from himself to that insolvent. These three rules existed prior to the codes, and have not been changed by the pro-

visions of the statute under consideration." And in section 166 he says: "Notice may be required to cut off other defenses; but a setoff, according to the accepted rule, must exist in the form of a debt then due and payable to the debtor at the date of the transfer."

Inspection of the statutes makes it evident that notice to the debtor of the transfer of his debt is not necessary to prevent the successful interposition, as a setoff at law against such debt, of a claim against the assignor which was not due and payable at the time of transfer and the authority of adjudged cases is in affirmance of this doctrine, although in some jurisdiction a contrary rule is announced.

It is to be remarked, in passing, that while we speak of "setoff" as a defense, this use of the word is neither technically correct nor warranted by sections 690, 691, and 692, of the Code of Civil Procedure, which include within the definition of "counterclaim" that which was formerly "setoff," and which provide for "defenses" as contradistinguished from "counterclaims": *Babcock v. Maxwell*, 21 Mont. 507. We venture to use "setoff," and to speak of it as a defense, because in section 571 it is so used; and also because the ultimate natural effect of allowing the deposits as a counterclaim against the note in the hands of the Butte bank would be setoff, since the deposits owing by the assignor to plaintiffs could be used only defensively, as against the assignee, to diminish or defeat recovery by it, and not as a basis for a money judgment.

No new dealings were had or agreements made, between plaintiffs and the Helena bank after the assignment of the note and before notice thereof; and this opinion is not to be construed as denying the right to interpose any defense which might have vested in plaintiffs consequent upon satisfaction, by payment to the Helena bank or otherwise, of the note, in whole or in part, before notice of assignment or which might have resulted from the execution or partial performance by plaintiffs, prior to such notice, of a contract with the Helena bank for a setoff of the deposits against the note.

We hold, then, that by the indorsement of July 18th the right to recover the amount of the note upon maturity was transferred to the Butte bank, subject only to such claims as the makers might at that time have been allowed to set off, at law or in equity, against the Helena bank; in other words, the claim of plaintiffs is not a setoff against the assignee for value, unless it could have been properly asserted as such ²¹⁴ against

the assignor while the note belonged to the latter. The Butte bank took the note subject to any right of setoff which plaintiffs may have had against the Helena bank at the time of the indorsement. We shall ignore, for the present, at least, the fact that the three certificates represent deposits to the credit of the several members of the firm and regard them as debts owing by the Helena bank to Stadler & Kaufman. Under sections 691 and 692, and at law, there can be no setoff of one debt against another unless both were due and payable before the transfer of either to a third person: *Coffin v. McLean*, 80 N. Y. 560; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580. The note was transferred July 18th and fell due September 16th. Its immaturity when indorsed prevented the deposits, whether due or not, from being a legal setoff.

Did plaintiffs on July 18th have the right in equity to set off the deposits against the note? They maintain they did upon three grounds which, as we understand them, may be epitomized as follows: 1. That there was an agreement or understanding between the Helena bank and themselves that, in the event the funds wherewith to pay the note at maturity were not received from a certain source, the certificates of deposit might be used for that purpose; 2. That the Helena bank lent the six thousand dollars to plaintiffs because of their deposits, to which all parties trusted as a means of payment—thus presenting a case of mutual credit; and 3. That the Helena bank was insolvent on July 18th and that all the deposits were then due and payable.

Disposition of the first two contentions is readily made. Finding 27 of the trial court is that the loan to plaintiffs upon the note was not made by the Helena bank upon the credit of their deposits, nor upon any agreement or understanding that the note should be paid out of the certificates of deposit. This finding negatives the theory of a mutual credit with respect to all the deposits, including the one subject to check and sets at rest the controversy as to whether there was an understanding for a setoff of the other deposits against the note. This ²¹⁵ finding is consistent with the other findings, is justified by the evidence and must stand. With respect to the absence of a finding upon the issue whether there was such an agreement or understanding as to the deposit subject to check, it is sufficient to say that the evidence does not tend to prove there was.

We come now to the third ground maintained by plaintiffs. If that should be held tenable, but not otherwise, examination

of the asserted right to set off against a partnership debt the several debts owing to the partners individually will become necessary. Were the deposits due July 18th, and was the First National Bank of Helena then "insolvent," within the meaning of that word appropriate to the state of facts shown? If both conditions existed on July 18th, plaintiffs were then possessed of an equitable right to set off the deposits against the underdue note: *Richards v. La Tourette*, 119 N. Y. 54; *Hughitt v. Hayes*, 136 N. Y. 163; *Spaulding v. Backus*, 122 Mass. 557, 23 Am. Rep. 391; *Mercer v. Dyer*, 15 Mont. 317; *Yardley v. Clothier*, 51 Fed. Rep. 506; *Huse v. Ames*, 104 Mo. 91; *Fuller v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 312; *Kinsey v. Ring*, 83 Wis. 536; *Fera v. Wickham*, 135 N. Y. 223; *Pomeroy's Code Remedies*, sec. 163. In section 164 of the work last cited it is said, with reference to the maturity of claims: "Such a present indebtedness is indispensable, whether the case is to be governed by the ordinary rule, or whether the equitable doctrine based upon the assignor's insolvency is relied upon."

The two certificates of deposit, for five thousand dollars each, were payable, upon presentation, on and after November 6, 1896; so neither of them could have been allowed as setoff on July 18th even if the Helena bank were then insolvent, and they were rightly rejected. The action of the district court in permitting a setoff of the open deposit of four hundred and thirteen dollars and thirty-seven cents subject to check, and in disallowing the deposit of four thousand two hundred and forty dollars, payable on and after July 8th, upon return of the certificate, remains to be considered. By a deposit (other than special) in a bank, the money becomes the property of the bank, the relation of ²¹⁶ debtor and creditor is created (Civ. Code, sec. 2540), and a contract is implied that an equivalent sum of money shall be paid to the depositor upon demand therefor: Civ. Code, sec. 2451. The demand is for the benefit or protection of the bank. A cause of action does not exist against the depository until and unless a wrong, to wit, a breach of the contract, is committed. In the absence of fraud, no cause of action exists or right of action arises in favor of the depositor until demand and refusal, unless some act of the bank has waived the necessity for demand: *Downes v. Phoenix Bank*, 6 Hill, 297; *Payne v. Gardiner*, 29 N. Y. 146; *Morse on Banks and Banking*, sec. 322, and cases there cited. Certificates of deposit are governed by the same rule: *Seymour v. Dunham*, 24 Hun, 93; *Pardee v. Fish*, 60 N. Y. 265, 19 Am. Rep. 176;

Munger v. Albany City Nat. Bank, 85 N. Y. 580. Neither the amount of the open deposit nor of the certificate was demanded prior to September 4th; if the deposits were due July 18th, such maturity must have resulted from some act of the Helena bank, waiving demand of the one and presentation of the other. The effect of the suspension and declared insolvency of the Helena bank on September 4th, when the comptroller took charge, was to make these two deposits due and actionable, and, had the Helena bank then owned the six thousand dollar note, the deposits would have become instantly mature equitable set-offs against it; under such circumstances, a demand or presentation would necessarily be waived, since to make it would be an idle ceremony, not requisite for the protection of the bank, which was unable to comply therewith: **Chemical Nat. Bank v. Bailey**, 12 Blatchf. 480; Fed. Cas. No. 2,635; **Laybourn v. Seymour**, 53 Minn. 105, 39 Am. St. Rep. 579; **Scott v. Armstrong**, 146 U. S. 499; **Morse on Banks and Banking**, sec. 322, and cases cited hereinbefore. The court found upon sufficient evidence, that if the Helena bank had been closed, and its business settled on July 18, 1896, the amount that could have been realized from its assets would have been less than its liabilities at that time; that on July 18th and thereafter until September 4th it was unable from its own means to pay ²¹⁷ its debts as they matured, but that it did during such period actually meet and pay its obligations as they became due in the ordinary course of business. "Insolvency" has two meanings. In its popular sense, it signifies that condition of a person whose entire assets are insufficient to pay his debts in full. The term is, however, used in a restricted sense, to express the present inability of a trader to pay his current obligations as they mature, in the usual course of business: **Hayden v. Chemical Nat. Bank**, 84 Fed. Rep. 874; **Bouvier's Law Dictionary**, tit. "Insolvency"; **Standard Dictionary**, tit. "Insolvency"; **Buchanan v. Smith**, 16 Wall. 277; **Case v. Citizens' Bank**, 2 Woods, 23; Fed. Cas. No. 2489; 2 **Kent's Commentaries**, *389, note b; **Gluck and Becker on Receivers of Corporations**, 47. "It is in the latter sense that the term is used when traders and merchants are said to be insolvent, and, as applied to them, it is the sense intended by the [bankruptcy] act of Congress" (**Toof v. Martin**, 13 Wall. 40), and it has the same meaning, as applied to national banks, when used in the currency act: **Case v. Citizens' Bank**, 2 Woods, 23; **Market Nat. Bank v. Pacific Nat. Bank**, 30 Hun, 50. The test of "a trader's insolvency is

inability to pay his debts in the ordinary course, not inability to raise the money for them in the ordinary course": *Peabody v. Knapp*, 153 Mass. 242. In the popular sense of the word, and for some purposes, perhaps, in fact, the Helena bank was insolvent, on July 18th; but in the appropriate sense it was solvent for it then had the present ability to pay, and paid, all its obligations as they matured, in the ordinary course of business. The national bank act seems strongly to imply that, so long as an association is carrying on its business and meeting its obligations as they mature, whatever its actual condition as to future ability may be, it is, in the absence of fraud, not to be deemed insolvent, as between itself and its customers; and that it does not become so until, at the least, it commits an act of insolvency, and probably not until it suspends payment or is closed by the government: See U. S. Rev. Stats., secs. 5234, 5239, 5242; U. S. Rev. Stats., supp. 1, c. 156, sec. 1 (Stats. June 30, 1876). ²¹⁸ If on July 18th and immediately before the transfer, plaintiffs, being willing so to anticipate the payment of the note, had sought the aid of a court to set off the deposits against the note then held by the Helena bank, upon the ground that its liabilities exceeded its assets, and that although it was meeting its obligations, it was not doing so from its own means, would not the application have been denied for the reason that, since the bank was open, transacting business, and paying all its debts as they fell due, it was then solvent, and the deposits would presumptively be forthcoming on request, and that its possible, or even probable, inability at some future day to continue operations did not concern plaintiffs and constituted no waiver of, and furnished no excuse for, omitting the demand ordinarily prerequisite to the maturity of deposits? Would the court in such suit stop to investigate the source from which the means of present payment were derived, or to inquire into and determine whether or not the Helena bank, if closed on July 18th, could have liquidated in full? We are inclined to the opinion that the right of a depositor to set off his debt to such bank against the debt of the bank to him must, in the absence of fraud, be ascertained and determined by reference to the state and condition of the opposing demands at the time of declared insolvency, and we are satisfied that the policy of the law leads to this conclusion. Considerations of expediency suggest that the contrary view would open the way for evils innumerable. If it be that on July 18th assets and liabilities might have been compared, the

one with the other, in order to determine the solvency or insolvency of the bank at that time, by parity of reason the inquiry might be pursued indefinitely, and extend to any day, however distant in the past. The solvency of a bank on any given day would depend in most cases upon the inferences which the individual judge or jury might draw from expert and other evidence respecting the amount and value of its assets (among which are included the financial worth and the moral integrity of its debtors) and the extent of its liabilities; and different courts would not be unlikely to reach ²¹⁹ opposite results, even upon the same evidence, especially were it conflicting and the questions reasonably susceptible of either solution—one court adjudging the bank's solvency, and rejecting a setoff, and the other its insolvency, and allowing a setoff, and both decisions referring to its condition on the same day. To permit this would inject additional uncertainty and confusion into the inexact science of law and into the art of practicing it. The cases cited by plaintiffs in their able and exhaustive argument upon the subject do not militate against the views we entertain. They treat of the right of equitable setoff consequent upon, and growing out of, a trader's declared insolvency; and we have been unable, after diligent search, to find any persuasive authority to the effect that mere excess of liabilities over assets makes a trader insolvent so as to clothe his debtor with such equity, whatever may be its effect otherwise. Nor do sections 3971 and 4511 of the Civil Code control, for they merely define the circumstances in which the consignee of goods stopped in transit and the person who makes an assignment for the benefit of his creditors are insolvent within the meaning of chapter 5, and of title 3 of part 2, division 4, entitled "Stoppage in Transit," and "Assignment for the Benefit of Creditors," respectively.

It follows that the action of the court in disallowing the two certificates of deposit for five thousand dollars each and the certificate for four thousand two hundred and forty dollars as set-offs was correct, but that in allowing the deposit of four hundred and thirteen dollars and thirty-seven cents the court erred; in short, that the First National Bank of Butte is entitled to recover upon the note, and that plaintiffs are not entitled to any setoff against it. That part of the judgment appealed from by the bank will therefore be reversed, and the cause remanded, with direction to the court below to modify the judgment so that it shall conform to the views expressed in this opinion, and to enter it as modified; and it is so ordered.

Brantly, C. J., and Hunt, J., concur.

NEGOTIABLE INSTRUMENTS, WHAT ARE NOT.—A promissory note providing that in case a suit is brought thereon the makers shall pay such additional sum as the court may adjudge reasonable as attorney's fees, is not negotiable: *Kendall v. Parker*, 103 Cal. 319, 42 Am. St. Rep. 117. Contra, *Oppenheimer v. Bank*, 97 Tenn. 19, 56 Am. St. Rep. 778; *Salisbury v. Stewart*, 15 Utah, 308, 62 Am. St. Rep. 934, and note.

SETOFF—ASSIGNMENT OF CLAIM.—One who buys or takes an assignment of a non-negotiable claim takes it subject to such rights of setoff only as are due at the time of transfer: *Bradley v. Smith*, 98 Mich. 449, 39 Am. St. Rep. 565, and note; *Fuller v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 312.

SETOFF.—THE INSOLVENCY of a party is a distinct equitable ground for setoff against him, and this equitable right of the debtor cannot be taken away by the insolvent's assignment for the benefit of creditors: *St. Paul etc. Trust Co. v. Leck*, 57 Minn. 87, 47 Am. St. Rep. 576, and extended note treating of setoffs by and against banks. See, too, *Johnston v. Humphrey*, 91 Wis. 76, 51 Am. St. Rep. 873.

ADOPTED STATUTES—CONSTRUCTION OF.—If a statute of one state is adopted by another, the construction put upon the statute in the former will be adopted in the latter: *Cowhick v. Shingle*, 5 Wyo. 87, 63 Am. St. Rep. 17, and note; *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196. However, this rule of construction is not without qualifications: *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627; *Pratt v. Miller*, 109 Mo. 78, 32 Am. St. Rep. 656, and note.

BORDEAUX v. GREENE.

[22 MONTANA, 254.]

FENCE OBSTRUCTING LIGHT AND AIR.—The owner of property has a right to shut off air and light from his neighbor's windows by building a high fence or other structure on his own lots. It makes no difference whether his motive is malice toward his neighbor, or a desire to improve or ornament his property.

PLEADING—ALLEGATION OF—CONCLUSIONS.—An allegation in a complaint to abate a high fence as a nuisance, that it is liable to be blown over onto plaintiff's buildings, and may injure them, is an allegation of conclusions insufficient to withstand a general demurrer.

J. W. Cotter, for the appellant.

J. B. Wellcome and Clayberg & Corbett, for the respondent.

255 HUNT, J. Defendant built the fence upon her own property. That being true, we know of no statute of the state, or ordinance of the city of Butte, which, in the exercise of a police power, prevented her from putting up the structure. Nor will the law generally prevent it. The owner of a piece of property has a right to shut off air and light from his neigh-

bors' windows by building on his own lots. This doctrine is too well settled in this country to require authorities. He cannot annoy his neighbor with the smell of his privy vaults, or with percolating sewer water, or other inconveniences which the law recognizes as injurious; but the free use of light and air by an owner of the soil are his, to any extent he pleases, without regard to his neighbor's convenience or inconvenience: *Picard v. Collins*, 23 Barb. 444; *Letts v. Kessler*, 54 Ohio St. 73; Judge Campbell's opinion in *Burke v. Smith*, 69 Mich. 380. It ²⁵⁰ makes no difference whether defendant's motive in building the fence was one of malice toward her neighbor, or a desire to improve or ornament her property. She could, with a purely malicious motive, shut out her neighbor's light and air by a magnificent building; and why not, though prompted by a like motive, by a fence forty feet high? *Rideout v. Knox*, 148 Mass. 368, 12 Am. St. Rep. 560. Either method would be equally inconvenient and damaging to plaintiff, but the motive would have no more effect in the one case than in the other.

A person having a legal right can enforce the enjoyment of it without having his motive inquired into: *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93.

The allegation that the fence is liable to be blown over upon plaintiff's building, and may result in injuring the same, is very bad. It is not stated directly that the construction of the fence is defective or poor, or how it is dangerous to plaintiff's property, or that it is on account of any weak or negligent construction that plaintiff's property is endangered. The allegation is one of conclusions, and insufficient to withstand a general demurrer.

Judgment affirmed.

Brantly, C. J., and Pigott, J., concur.

EASEMENT IN LIGHT AND AIR.—The prevalent rule in the United States is, that an easement in the unobstructed passage of light over an adjoining close cannot be acquired by prescription: *Keating v. Springer*, 146 Ill. 481, 37 Am. St. Rep. 175, and note, citing numerous cases. One may obstruct his neighbor's air and light by erecting a high fence, and it is immaterial that in so doing he is actuated by malice: Note to *Phelps v. Nowlen*, 28 Am. Rep. 103. See, also, *Rideout v. Knox*, 148 Mass. 368, 12 Am. St. Rep. 560.

PLEADING.—FACTS, NOT CONCLUSIONS, should be stated in pleadings: *Davis v. Clements*, 148 Ind. 605, 62 Am. St. Rep. 539; *Robinson v. Berkey*, 100 Iowa, 136, 62 Am. St. Rep. 549, and note.

CAMERON v. KENYON-CONNELL COMMERCIAL CO.

[22 MONTANA, 312.]

TRIAL—NONSUIT.—On motion for a nonsuit, everything which the evidence tends to prove must be taken as true.

NUISANCE—STORAGE OF POWDER.—He is guilty of a nuisance who keeps in a frame warehouse within the limits of an incorporated city, in the vicinity of railroad depots and other buildings, an amount of highly explosive powder in excess of the quantity allowed to be stored therein by the laws of the state. He is subject to indictment for a misdemeanor, as well as liable in a civil action for injury to person or property caused by the nuisance.

CORPORATIONS—STORING EXPLOSIVES—MUNICIPAL ORDINANCES.—An ordinance of a city cannot authorize a larger quantity of powder to be kept by a corporation within the city limits than the state statute allows, so as to exempt the corporation from liability, unless some special exemption exists, excepting the inhabitants of such city from the operation of the general statute.

CORPORATIONS—LIABILITY OF DIRECTORS FOR TORT.—Third persons may hold directors of a corporation liable in positive tort, upon the principle that a positive wrong done by a servant or agent must be applied to the misfeasance of directors also.

CORPORATIONS—LIABILITY OF DIRECTORS FOR TORT.—The liability of a director of a corporation in tort is not to be avoided by his "vicarious character," when the tort of the corporation has been committed through the directors.

CORPORATIONS—LIABILITY OF DIRECTORS IN TORT. The directors of a corporation are personally responsible for the death of a person killed by an explosion of gunpowder unlawfully stored by the corporation, though they had no knowledge thereof, if, by the exercise of ordinary care and diligence, they could have known that it was so stored, and the burden of proof is on them to show that, in the exercise of such care and diligence, they could not have discovered that the powder was unlawfully stored and kept.

T. J. Walsh and J. W. Kinsley, for the appellant.

W. H. De Witt and J. F. Forbis, for the respondents.

314 HUNT, J. Plaintiff, as administratrix of the estate of Angus D. Cameron, deceased, brought this action against the Kenyon-Connell Commercial Company, a corporation, and M. J. Connell, W. R. Kenyon, J. E. Gaylord, C. H. Palmer, and W. A. Clark, trustees and agents of the corporation, for damages by reason of the killing of Angus D. Cameron on January 15, 1895, through force of an explosion of giant powder negligently and unlawfully kept by defendant corporation in its warehouse within the limits of the city of Butte.

The corporation denied the negligence and unlawful acts averred. Kenyon, Connell, and Palmer each separately an-

swered, and denied any unlawful or negligent act on his part, and each affirmatively pleaded that the warehouse was the property of the corporation, and that he never authorized or directed any powder to be stored therein, and was ignorant of the fact that any powder was stored therein. Gaylord and Clark each denied the allegations of the complaint, or that he was a managing agent or trustee or officer of the corporation.

Trial to jury. Motion for nonsuit by individual defendants was granted. Thereafter plaintiff's motion for a new trial as to defendants Kenyon, Connell, Palmer, and Gaylord was overruled. Plaintiff appeals.

The record discloses these facts: The defendant corporation dealt in hardware, merchandise, and powder. It owned a large frame, iron-roofed warehouse, near a railroad depot within the corporate limits of the city of Butte, where it kept its merchandise, including Hercules powder, a dangerous explosive compound of nitroglycerine and other substances. On the night of January 15, 1895, the warehouse took fire. Plaintiff's intestate, Cameron, was the chief of the fire department of the city of Butte, and commanded the firemen who responded to the alarm. While the firemen were actually engaged in an endeavor to put the fire out, a fearful explosion ³¹⁵ occurred within the corporation's warehouse, and many persons, including Cameron, were killed.

From the beginning of the year 1893, Hercules and giant powder had been kept in the warehouse. Defendants Kenyon and Connell had both been seen in or about the building during 1893, and at divers times up to the time of the explosion—Kenyon often, Connell very seldom, the other defendants never. The quantity of powder kept in the warehouse about the 1st of each month was from twenty to fifty boxes, larger quantities being stored in a powder magazine three miles out of the city. On the day before the explosion a witness saw some seven boxes of powder, fifty pounds in each box, in the warehouse. An employé, one Orcutt, had immediate charge of the warehouse, and ordered the powder put where it was. He said that on the day of the explosion he thought there was somewhere about three to five cases of powder in the warehouse; while another witness, a mining superintendent accustomed to using powder, said he thought a ton must have exploded on the night of the fire.

Defendant Connell was president of the corporation; Kenyon was general manager. Kenyon's duties were to give attention to the corporation's business, his particular duties being to look

after the financial part, and ordering goods, but not to manage or control the warehouse or magazine, which were under the warehouseman Orcutt's direct charge. Neither Connell, the president, nor any of the other trustees, except Kenyon, had anything whatever to do with the actual personal management of the affairs of the corporation.

It is plain that this corporation, like many others in the commercial world, had one head—director—to whom all the other trustees gave the entire practical management of the concern.

It thus furnishes but a single instance of the common practice among business men to incorporate commercial enterprises and, in doing so, of their trusting the entire actual management to the one director who is familiar with, and assumes the real control of, the particular business undertaken. ³¹⁰ This custom has doubtless been the outgrowth of a belief, generally correct too, that by incorporating mercantile or other undertakings, directors are not liable to creditors in case of business reverses, while those who associate themselves as members of a partnership are.

But, notwithstanding all this, there are various unavoidable responsibilities that attach themselves inseparably to the office of corporate directorship, which, in case of negligence or misconduct, often illustrate the risks incidental to accepting such positions of trust in a corporation and of not prudently guarding against their possible consequences.

It is a general rule that the ordinary business of a corporation is managed in the name and on behalf of the corporation by particular agents, chosen by the stockholders. These agents are the directors. For their acts, performed within the apparent scope of their authority, the corporation is responsible, while, e converso, the corporation can act through these agents alone.

These principles are generally familiar to business men, as well as to lawyers. They control the relation of the artificial being, the corporation, to the world at large. They find their foundation in the law of agency, which makes the corporation the principal; still, they are extended, under certain conditions, far enough to inculcate the agents or directors of the corporation, notwithstanding the fact that the principal may also be liable for a wrong done.

Now, bearing in mind that this case presents itself upon a motion for a nonsuit and that we must accordingly consider as true everything which the evidence tended to prove on the trial, we have before us a corporation guilty of a nuisance, by having

kept in a frame warehouse within the limits of an incorporated city, in the vicinity of railroad depots and other buildings, an amount of Hercules powder in excess of the quantity—fifty pounds—allowed to be stored therein by the laws of the state: Montana Laws, Ex. Sess. 1887, p. 68; Comp. Stats. 1887, div. 1, sec. 361; *Cheatham v. Shearon*, 1 Swan, 213, 55 Am. Dec. 734. It is very hard to conceive of anything ³¹⁷ more terrible in its danger to life and property than a quantity of highly explosive powder kept near to where people live or do business. Such a menace, when known, obstructs that free use of property which the law assures to an owner; while nothing could more seriously interfere with the comfortable enjoyment of life than the knowledge that in one's neighborhood there is a frame building in which nitroglycerine explosives are stored in large quantities. No ordinance of a city could authorize a larger quantity of powder to be kept by a corporation within the city limits than the state statute allows, unless some special exception is to be found exempting the inhabitants of such city from the operation of the general statute. None such affecting Butte is known to us, however; so we must regard the ordinance of that city, pleaded by defendants, which permits one hundred and fifty pounds of powder to be kept at one time by a company in its warehouse within the limits of that city, as inconsistent with the state law, without force, and immaterial to the case before us.

The corporation, therefore, by maintaining this nuisance, became the subject of indictment for misdemeanor (*Wharton's Criminal Law*, sec. 91), as well as liable in civil action for injury to person or property caused by the nuisance: *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654.

These propositions are too plain for extended comment. They demonstrate a liability to this plaintiff—assuming always the evidence is uncontradicted. Hence we pass to the more direct inquiry whether the directors of the guilty corporation are also liable for Cameron's death.

As said before, the trustees manage the stock, property, and concerns of a corporation (Comp. Stats., div. 1, sec. 450); wherefore it is difficult to see how all responsibility in this management can be avoided as long as the trustees hold their offices. Certainly, the ministerial work of a corporation may be delegated to subordinate agents, and often must be. The details of a corporation's business necessitates this; and if directors act in good faith, and with reasonable care and diligence in appointing

and supervising such inferior ³¹⁸ agents, they are not personally responsible for damages occasioned by the agents' negligence, or even crimes: Thompson on Corporations, sec. 4107. But a director cannot wholly escape his duty of supervision or transfer his authority to represent his principal, at least without the principal's consent; otherwise he could evade every responsibility imposed by law upon him by simply absenting himself from meetings, or by avoiding information of the acts of the other directors in expressing the will of the corporation, or by delegating an employé to act as trustee for him. Morawetz on Private Corporations, in section 536, says: "The general supervision and direction of the affairs of a corporation are especially intrusted by the shareholders to the board of directors; it is upon the personal care and attention of the directors that the shareholders depend for the success of their enterprise. It follows that authority to delegate these general powers of management cannot be implied. Thus, the directors of a company have no implied authority to enter into a contract with a creditor by which the entire management of the company's affairs is placed in his control until the debt has been paid.

Third persons may hold directors liable in positive tort, upon the principle that a positive wrong done by a servant or ordinary agent must be applied to the misfeasance of directors also: Salmon v. Richardson, 30 Conn. 360, 79 Am. Dec. 255.

Persons having in their custody gunpowder or other instruments of danger should keep them with the utmost care. "The risk incident to dealing with fire, firearms, explosive or highly inflammable matters, corrosive or otherwise dangerous or noxious fluids, . . . is accounted by the common law among those which subject the actor to strict responsibility. Sometimes the term 'consummate care' is used to describe the amount of caution required; but it is doubtful whether even this be strong enough. At least, we do not know of any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him": Webb's Pollock on Torts, 615.

³¹⁹ A company charged with an obligation of this nature cannot devolve it upon another in a manner so as to exonerate the company from a liability for an injury caused to a third person by the negligent way in which the duty pertaining to the care of giant powder or other dangerous explosives may be executed. In torts, the relation of principal and agent cannot relieve the wrongdoer: Berghoff v. McDonald, 87 Ind. 559.

It is unnecessary to consider the rule which relieves the master from liability for his servant's acts, where the servant does something outside of his employment, for that is not involved.

But the case does present facts to which this principle fits—that whatever the servant is intrusted by the master to do for him must be performed with a like degree of care which the law holds the master to were he acting for himself.

We apply this principle for the reason that there is a presumption that the trustees of a trading corporation know of the principal articles in which the company deals, and whether or not such articles are highly dangerous to life and property.

It is therefore the duty of the trustees of a corporation dealing in explosives to exercise such reasonable supervision over the management of their company's business as will result in the observance of the utmost care on the part of the subordinates who direct or handle the explosives. This rule grows out of "the great principle of social duty that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it": *Farwell v. Boston etc. R. R. Co.*, 4 Met. 49, 38 Am. Dec. 339. It is likewise their duty to avoid the creation of nuisances by their corporation, through its employés acting within the line of their duties.

Nor will inaction by itself overthrow the force of this obligation upon trustees to so control their corporation's business as to not negligently injure third persons. Along with the assumption of the duties of trusteeship go the duties of exercising reasonable care in the manner of performing those duties. ³²⁰ This reasonable care appears not to have been exercised in this case, where the corporation, by its trustees, permitted a public nuisance to be created, and to continue, whereby, as a consequence of the act of permitting it, a third person, not in fault, has been killed.

Because directors are themselves agents, it is none the less true that they owe a common-law duty to third persons. If they violate that duty, they are responsible, whether the violation is the result of a wrongful omission or commission: *Mechem on Agency*, sec. 572. Were the rule such that wrongful commission alone meant liability, as before indicated, directors' statutory duties to manage would be sufficiently performed by absence; and, the denser the ignorance on a director's part of the business of his concern, the more certain his

exoneration from liability for the tortious acts of the company's employés. Such a rule would be unhealthy and unsound.

The liability of a director in tort is not to be avoided by his "vicarious character," where the tort of the corporation has been committed through the directors: *Nunnely v. Southern Iron Co.*, 94 Tenn. 397; *Bank of Atchison Co. v. Byers*, 139 Mo. 627; *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456.

Relationship of contract to a corporation neither adds to nor subtracts from a man's duty to strangers to so use his own property, or that under his control as not to injure another: *Baird v. Shipman*, 132 Ill. 16, 22 Am. St. Rep. 504; Riche's note to *Nunnely v. Southern Iron Co.*, 94 Tenn. 397; *Jenne v. Sutton*, 43 N. J. L. 257, 34 Am. Rep. 578; *Mayer v. Thompson-Hutchinson Bldg. Co.*, 104 Ala. 611, 53 Am. St. Rep. 88.

Eminent judges have drawn distinctions between a trustee's liability for misfeasance, malfeasance, and nonfeasance: *Bell v. Josselyn*, 3 Gray, 309, 63 Am. Dec. 741. But they are of no vital importance on this appeal. Nevertheless, reasoning upon these distinctions, defendants have argued that they are liable, if at all, to the corporation only, inasmuch as the record shows nonfeasance merely, or nonexecution of the duties of their ³²¹ directorships. This argument seems to overlook the proposition that directors are charged with the affirmative duty of knowing something of the management of their company's business, and of exercising reasonable supervision of its management. Management usually signifies positive, rather than negative, conduct.

As a matter of defense, it is proper to show all facts by which the jury can say whether the inaction or ignorance relied on is a sufficient excuse for the wrong done. But we have no hesitation in saying that, upon a state of facts like that before us, nonexecution which resulted in the positive act of a creation and maintenance of a continuing nuisance on account of which a third person was killed amounts, unless explained, to misfeasance upon the part of all the directors of the company, except as to Kenyon, who, it appears *prima facie*, must have actually known of and authorized the nuisance. As to him it was malfeasance.

A director who knew nothing of the nuisance, and who could not, by exercising ordinary diligence in control, have known of it, or, generally speaking, one who, considering the situation and all the attendant circumstances, has performed his duty of tak-

ing care is not liable, and cannot be held so. In this case the defense must show this though, for a prima facie case is made by plaintiff.

Due care involves several elements relative to the circumstances of the case. Ordinary care, for instance, on the part of a corporation that deals in hardware would not prevent the storage of large quantities of nails in a frame warehouse in the middle of a city. The dangers from doing so would be slight, even in case of fire or lightning; but such a practice with giant powder or nitroglycerine would be negligence, fraught with imminent peril to life and property. We said, in considering the law of negligence in a boiler explosion case (*Johnson v. Boston etc. Min. Co.*, 16 Mont. 175): "Familiar underlying principles, evolved from generations of experience and thought, are to be applied to the peculiar ³²² phases presented by the facts and circumstances of the particular case under investigation. And so we find the opinions, in discussing the definition of 'ordinary care,' recognize that no fixed arbitrary rule can be laid down, but that the degree of care and vigilance required varies according to the exigencies which require attention and vigilance, conforming in amount and degree to the particular circumstances under which they are to be exercised."

In *Railway Co. v. Ives*, 144 U. S. 408, the court, in very clear language, said: "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw

the same conclusion from them that the question of negligence is ever considered as one of law for the court."

After all, therefore, the question of the personal liability of the officers of this corporation for the negligence which resulted in Cameron's death, resolves itself into whether or not they exercised reasonable diligence in the control and supervision in their management of the corporation's business, or whether they were negligent in doing or not doing so under all the circumstances of the case.

• 323 The case must be reversed and remanded for a new trial. It is so ordered.

Brantly, C. J., and Pigott, J., concur.

NUISANCE—POWDER WORKS.—The manufacturing and keeping of large quantities of gunpowder and other explosives in or dangerously near such public places as towns and highways is a public nuisance, and indictable as such, whether negligently or carefully conducted: *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 52 Am. St. Rep. 890, and note. One who keeps a large amount of gunpowder in a building near others is liable in damages for injuries resulting therefrom: *Note to Lafin etc. Powder Co. v. Tearney*, 19 Am. St. Rep. 39.

TRIAL.—ON MOTION FOR A NONSUIT the court will assume the truth of facts which plaintiff's testimony legitimately conduces to prove, though they are controverted by defendant's witnesses: *Ernst v. Hudson River R. R. Co.*, 35 N. Y. 9, 90 Am. Dec. 761; *Sheridan v. Brooklyn etc. R. R. Co.*, 36 N. Y. 39, 93 Am. Dec. 490.

Liability of Directors of Corporations for Torts.*

Directors of corporations are regarded as agents thereof, and, as such, are personally liable to third persons for fraud, misfeasance, or positive wrongs. "Directors of a corporation, in the management of its affairs, are the power which gives expression to its will, but it is no part of their duty to perpetrate crimes or frauds in its name or for its benefit, and, whatever the liability of the corporation may be, the individuals who, under cover of their office of directors, commit wrongs or frauds, ought to be, and in our judgment are, upon the clearest principles of law and justice, accountable for their conduct in a civil action at the suit of the injured party, and whether directors of a corporation are to be regarded as its agents or its elements, impartial justice and public policy both require that as all natural persons are, so they should be, held responsible to third persons for the misfeasances by them in fact committed or commanded. The familiar principles applicable in the case of positive torts committed by servants and ordi-

***REFERENCE TO MONOGRAPHIC NOTES.**

Liability of corporate directors for negligence: 17 Am. St. Rep. 95-101.

Personal liability of corporate officers to third persons: 48 Am. St. Rep. 913-923.

nary agents must be applied to the misfeasances of directors also, and, though it may sometimes be difficult to prove the actual participation of individual directors in the acts complained of, the legal principle which subjects them when discovered is not affected by such contingency": *Salmon v. Richardson*, 30 Conn. 360, 79 Am. Dec. 255, 257.

"No one should be permitted to escape personal liability, for fraud practiced by himself, or in connection with others, upon another, in his or their official capacity or character of president, director, or secretary of a private corporation upon the ground that they were acting for the corporation. To claim exemption upon the ground of official responsibility, or that the fraud was committed for the benefit of the corporation, is equivalent to claiming that the corporation is liable for the fraud of its officers, and the officers themselves are not liable": *Bank of Atchison County v. Byers*, 139 Mo. 627-659.

If a series of acts or continuous course of conduct on the part of the directors, in violation of a statute, finally produces the insolvency of the corporation, a creditor may hold such directors personally liable for his debt: *Patterson v. Stewart*, 41 Minn. 84, 16 Am. St. Rep. 671. The directors of a corporation constitute its controlling power, and are not to be regarded merely as its agents or servants acting under a delegated authority. The doctrine that principals are not liable for the willful misconduct of their agents cannot be applied to them, for they, as well as the corporation, are liable for their willful wrongs: *Goodspeed v. East Haddam Bank*, 22 Conn. 530, 58 Am. Dec. 439. The president and director of an incorporated omnibus company who issues an order to the drivers of cabs to exclude all colored persons is individually liable for the ejection and personal injury of a colored person by such driver: *Peck v. Cooper*, 112 Ill. 192, 54 Am. Rep. 231. If an incorporated irrigation company, its president acting for it, by its ditches injures the land of another, in the perpetration of a trespass, both the corporation and the president are liable, either jointly or severally: *Bates v. Van Pelt*, 1 Tex. Civ. App. 185. If a trespass has been committed by a corporation, it and the director under whose direction it acted are jointly liable therefor: *Favorite v. Cottrill*, 62 Mo. App. 119.

In *O'Neil v. Young*, 58 Mo. App. 628, it was held that a managing director of a corporation is not personally liable to one of its employes who, at his direction, used an unsafe appliance furnished by the corporation, unless he was aware of the unsafe condition of the appliance at the time. This, for the reason that an agent is liable to third persons only for active tort or misfeasance while acting within the scope of his agency. In *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 48 Am. St. Rep. 911, it was decided, however, that a director, who was an officer and agent of a corporation, whose duty it was to provide safe machinery, but who set an in-

experienced employé at work upon a machine which he knew to be defective and dangerous, was guilty of a misfeasance and responsible to such employé for injuries occasioned thereby.

If a director, as agent for a corporation, knowingly operates, or assists in operating, a street railway, when the license tax imposed by a city ordinance on such business is unpaid, he is liable to prosecution and punishment, as prescribed by such ordinance: *Wyandotte v. Corrigan*, 35 Kan. 21. The directors of a corporation may be held personally liable for a nuisance created under their general authority to manage the business of the corporation, and this though they may be ignorant of the particular plan adopted by which the nuisance is created. This liability is placed upon the ground that "the agents of a corporation are clearly liable for their tortious acts; they are therefore liable for any injury to the property of others amounting to a nuisance, and the liability is clearly independent of any liability which the corporation may have incurred": *Nunnally v. Southern Iron Co.*, 94 Tenn. 397.

The directors of a corporation are personally liable to third persons, as trustees for fraudulent breaches of trust, or willful abuse of their trust, or for the misapplication of the funds of the corporation: *Robinson v. Smith*, 2 Paige, 222, 24 Am. Dec. 212; *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624.

Directors of a corporation placing bonds in the hands of an agent for sale and falsely and knowingly causing them to be indorsed with a fraudulent indorsement, are personally liable to purchasers in good faith relying on such indorsement, and injured by the misrepresentation: *Clark v. Edgar*, 84 Mo. 106, 54 Am. Rep. 84. If directors of a corporation knowingly issue illegal stock beyond the amount authorized by the corporate charter, and obtain a loan upon such stock as collateral, upon representations that the stock is good and valuable, the directors are personally liable without first suing the corporation upon the note given by it for the loan: *National Exchange Bank v. Sibley*, 71 Ga. 726. Or, if the directors of a corporation make a fraudulent overissue of stock, they are personally liable to a subsequent purchaser thereof, to whom they have given a stock certificate: *Bruff v. Mali*, 36 N. Y. 200. And the directors of a corporation which has purchased the franchises and property of another corporation are personally liable to the creditors of the latter for a misapplication of its assets, leaving its debts unpaid: *National Bank v. Texas Inv. Co.*, 74 Tex. 421. Directors of a corporation are personally liable for their tort, if they suffer the corporate funds or property to be wasted or lost by gross negligence and inattention to the duties of their trust: *Horn Silver Min. Co. v. Ryan*, 42 Minn. 196.

ROCKEFELLER v. DELLINGER.

[22 MONTANA, 418.]

PARTNERSHIP IN LANDS.—Although a partnership as such cannot hold the legal title to land, it may in equity own real estate without reference to the title at law, it being of no importance who holds the legal title, or how he came by it, excepting so far as these facts express or reveal the intention of the partnership.

PARTNERSHIP IN LAND—RIGHTS OF CREDITORS.—If land is purchased by a partnership with partnership assets and for partnership purposes, and is then mortgaged in order that the partnership may obtain money for use in furthering the business of the firm, such mortgage is superior to a prior judgment against one of the members of the firm, even though none of the money realized on the mortgage is used in the partnership business.

E. Scharnikow and W. H. De Witt, for the appellant.

G. E. Winston, for the respondent.

⁴¹⁹ **PIGOTT, J.** Action to foreclose a mortgage upon lot 2 in block 117 in Anaconda, Deer Lodge county, known as the "Cottage Home property," made by defendants Root and Vineyard to secure the payment of their note for two thousand dollars to plaintiff, made September 17, 1892. The complaint alleges, among other things, that the defendants Samuel D. Root and Gordon C. Vineyard were copartners in a certain patent for improvements in cable railways, and in the sale, introduction, and operating thereof; that contemporaneously with the execution of the note and mortgage and as part of the same transaction, they, as such copartners, purchased from one Parrott the land affected by the mortgage, and that the sum mentioned in the note was lent by plaintiff, and borrowed by ⁴²⁰ them as copartners, for the purposes of the partnership business; that the land mortgaged was partnership property, and was paid for with assets belonging to the partnership; and that the defendant Dellinger claims some interest in or lien on the land, which interest or lien is subject to the lien of plaintiff's mortgage. Dellinger, in his answer, denies the averments of the complaint with respect to the partnership, and affirmatively sets up that on April 1, 1892, he recovered judgment in the district court of Deer Lodge county against defendants Vineyard and wife for two thousand one hundred and seventy-seven dollars and fifty cents, which was duly entered and docketed on that day, and remains wholly unpaid; that the same is a lien upon the land prior and superior to that created by the mortgage, and prays for a decree that out of the proceeds de-

rived from the foreclosure sale he be paid the amount of his judgment, as a first lien and charge upon the lands and such proceeds. The court found, in effect, that Dellinger recovered a judgment against Vineyard and wife as alleged in the answer, which judgment was duly docketed on April 1, 1892; that on September 17, 1892, defendants Gordon C. Vineyard and Samuel D. Root bought from Parrott the Cottage Home property, and as part of the same transaction, so far as they were concerned, executed to plaintiff a mortgage thereon to secure the payment of the two thousand dollars then borrowed, and represented by the note; that, at the time of the purchase from Parrott, Root and Vineyard were copartners, as alleged in the complaint, under the firm name of Vineyard & Root; and that the consideration of the conveyance by Parrott to them was an interest in the copartnership assets; that the purchase was a partnership transaction, and the conveyance, though made to them as individual persons, was also a partnership transaction; that the land belonged to the copartnership, and that the mortgage was executed for the purpose of raising money to further the partnership enterprise in connection with the tramway device, and to pay certain partnership debts; that the lot so purchased and mortgaged was not used for any partnership purpose other than to raise the money, the payment of which was secured ⁴²¹ by the mortgage; and that thirteen hundred dollars of the sum so borrowed from plaintiff were used for the payment of certain partnership debts, and in the partnership business. As matter of law, the court concluded that the judgment lien of Dellinger is inferior to the mortgage lien of plaintiff; that plaintiff is entitled to have the full amount of his mortgage declared a first lien on the land, and to a sale thereof in satisfaction; that Dellinger is entitled to have any overplus resulting from the sale, not exceeding a moiety, applied in or toward the satisfaction of his judgment. A judgment and decree were entered accordingly, and therefrom, as well as from an order refusing a new trial Dellinger appeals.

1. The first assignment of error is, that the evidence is insufficient to justify the finding that, out of the two thousand dollars borrowed of plaintiff, the sum of thirteen hundred dollars was used for the benefit of the partnership. Abundance of testimony was adduced tending to prove the fact so found, and the finding cannot be disturbed. The other

findings, all of which are based upon uncontradicted evidence fully justifying them, are conceded to be correct.

2. The conclusion of the court that Dellinger's judgment lien was inferior to plaintiff's mortgage lien, as against Vineyard, to the full amount of the mortgage, is attacked as not supported by the findings of fact; the contention being that the mortgaged land itself was never actually used in the partnership business, and that only a part of the money borrowed from plaintiff upon the mortgage was used by the firm. From this it is argued that the land purchased of Parrott was owned by Root and Vineyard individually, as mere tenants in common, and that, therefore, the lien of Dellinger's judgment attached to Vineyard's undivided half interest immediately upon the delivery of the conveyance of September 17, 1892. Plaintiff's position is, that the land was partnership real estate, and that his mortgage is a lien superior in right to the lien of Dellinger.

From the time it is docketed, a judgment becomes a lien upon the nonexempt real property of the judgment debtor ⁴²² then owned or within six years thereafter acquired, by him, and situate in the county where the docket is kept: Comp. Stats. 1887, div. 1, sec. 307; Code Civ. Proc. 1895, sec. 1197. It is not a specific lien, or a lien in rem. It affects or charges only the actual interest of the debtor in the land—the subject of the ownership—and does not create a preference over, but is subject to, all prior legal or equitable titles in other persons: Vaughn v. Schmalsle, 10 Mont. 186; Page v. Thomas, 43 Ohio St. 38, 54 Am. Rep. 788; Harney v. First Nat. Bank, 52 N. J. Eq. 697. When Dellinger's judgment was docketed, Vineyard had no interest in the land. Whatever interest he afterward held was acquired by the conveyance of September 17, 1892, and to such interest the lien attached. What was that interest? Although a partnership, as such, cannot hold the legal title to land, it may in equity own real estate, without reference to the title at law; it being of no importance who holds the legal title "or how he came by it, excepting so far as these facts express or reveal the intention of the partnership": Parsons on Partnership, 4th ed., sec. 267. "Nor does it seem to be material in what manner or by what agency the land is bought, or in what name it stands. It may be conveyed to all the partners as tenants in common, and this, perhaps, is the usual and best way. . . . Nor is it necessary that the trust (in favor of the partnership) should be expressed; for, however proper and expedient this is, yet, if the trust be wholly omitted, and have

no existence on record, the law will sometimes, and equity always, supply this want and treat the ownership as a distinct trust, if only the trust exist and is capable of proof, and the land be in fact and substance partnership property": Parsons on Partnership, 4th ed., sec. 265. The deed runs to Gordon C. Vineyard and Samuel D. Root as grantees, from which the inference arises, *prima facie*, that they took, not as partners, but as tenants in common, each owning an undivided half interest. Unless rebutted this inference is conclusive, and Dellinger's judgment would be a lien on the half interest of Vineyard superior to ⁴²³ plaintiff's mortgage thereon. Assuming, as we do, that the conveyance by Parrott was prior in point of time to the mortgage by Vineyard and Root, there was an appreciable interval between these two instruments of September 17th, during which the judgment of Dellinger would become a lien upon the interest belonging to Vineyard. If the land was acquired and held by Vineyard and Root as partnership property, the mortgage, though executed subsequently to the transfer by Parrott, and not connected with it, would take precedence of the lien of the judgment; for in that case the only interest Vineyard could have in the land would be his share therein, or his proportion of the residue thereof after settlement of all partnership affairs, including liabilities incurred after the conveyance: *Page v. Thomas*, 43 Ohio St. 38, 54 Am. Rep. 788. Until such settlement was made, creditors of the partnership might by legal process subject the land to the payment of their demands; and the copartnership, the owner in equity, in the name of and by its members, in whom, collectively, is the whole legal title as well as the equitable ownership, might mortgage the land, thereby creating a lien superior to that theretofore imposed by the docketing of a judgment against one of the partners.

The consideration for the conveyance by Parrott of the Cottage Home property was the assignment to him by Root and Vineyard, as copartners, of an interest in the partnership assets. The mortgage to plaintiff was made for the purpose of raising money to further the partnership business, and to pay certain partnership debts. The purchase from, and the deed of conveyance by, Parrott was a partnership transaction. These facts are sufficient to establish the partnership character of the land purchased from Parrott and mortgaged to plaintiff. The intention of the parties at the time the conveyance was made is the proper criterion by which to determine whether

the real estate granted to them then became a portion of the partnership assets. To evince presumptively the intention to take and hold land as partnership property, which has been conveyed to the several copartners, nothing need be shown, except that the land was purchased with partnership assets or ⁴²⁴ funds; and, in the absence of all circumstances tending to prove the intention to have been otherwise, that presumption will usually control and be decisive. As an aid in ascertaining the intention or design of the grantees, it is proper to receive evidence with respect to any matters having a tendency to disclose that intention, whether occurring before or after the purchase. To make the land conveyed to the partners as individual persons partnership property, it is not absolutely indispensable that the land should be actually used for partnership purposes; but evidence that it was so used is some evidence that the conveyance is to be treated as granting to the partnership the equitable ownership, and that the conveyance is not to have the legal effect of making the grantees simply tenants in common. These rules are supported by reason, and in accord with the decided weight of authority: *Hoxie v. Carr*, 1 Sumn. 173; *Fed. Cas. No. 6802*; *Smith v. Smith*, 5 Ves. Jr. 189; *Hunt v. Benson*, 2 Humph. 459; *King v. Weeks*, 70 N. C. 372; *Buchan v. Sumner*, 2 Barb. Ch. 165, 47 Am. Dec. 305; *Collumb v. Read*, 24 N. Y. 505; *Fairchild v. Fairchild*, 64 N. Y. 471; *George on Partnership*, secs. 45, 48; *Goldthwaite v. Janney*, 102 Ala. 431, 48 Am. St. Rep. 56, and note 67; note to *Page v. Thomas*, 43 Ohio St. 38, 54 Am. Rep. 793, and cases there cited; and see *McKinnon v. McKinnon*, 56 Fed. Rep. 409.

In the case at bar, the court found, and the evidence tends to show, not only that the land was bought with partnership assets, and for partnership purposes, but that it was mortgaged in order that the partnership might thereby obtain money for use in furthering the business of the firm. True, the land was not physically devoted to the active prosecution of the tramway enterprise, but it unquestionably was devoted to a purpose within the scope of the partnership. Had none of the money raised by the mortgage been applied to partnership uses, the result would not be different; for failure to apply the money to the use of the partnership would serve only as an item of evidence, tending to prove that the intention of ⁴²⁵ Root and Vineyard was to acquire and hold the land as tenants in common, and not in trust for the copartnership.

As we have said, there is no attack upon the findings of the court that the conveyance by Parrott was in consideration of an interest in the partnership assets of Vineyard & Root, that the purchase and the conveyance were partnership transactions, and that the mortgage was executed for the purpose of raising money for the benefit of the partnership. These findings are amply sufficient to justify the conclusions of law and the decree of the court in favor of the plaintiff, even if the evidence had disclosed that none of the money borrowed from plaintiff was used by the partnership.

Let the judgment be affirmed.

Hunt, J., concurs.

Brantly, C. J., disqualified.

IN THE CASE of *Quinn v. Quinn*, 22 Mont. 403, it was held, on the authority of the principal case, that lands purchased with partnership funds for partnership purposes are firm property, although the title is taken in the name of one of the partners, or is conveyed to such partners as tenants in common.

PARTNERSHIP.—REAL ESTATE bought with partnership funds for firm purposes and applied to firm uses or entered or carried as a partnership asset, is deemed in equity to be firm property, no matter in whom the title is vested: *Robinson Bank v. Miller*, 153 Ill. 244, 46 Am. St. Rep. 883; and as such it is subject to the payment of partnership obligations in preference to the individual debts of partners: *Goldthwaite v. Janney*, 102 Ala. 431, 48 Am. St. Rep. 56; *Page v. Thomas*, 43 Ohio St. 38, 54 Am. Rep. 788. See extended notes to the cases last cited for a full discussion of partnership real estate; also, *Stover v. Stover*, 180 Pa. St. 425, 57 Am. St. Rep. 654, and note.

STATE v. SIXTH JUDICIAL DISTRICT COURT.

[22 MONTANA, 449.]

APPEAL—STAY BONDS—JUSTIFICATION OF SURETIES.—The statute requiring a justification of sureties on a stay bond is directory and is meant to be for the respondent's, and not appellant's, benefit, and may be waived by the former.

APPEAL BONDS—RIGHT OF SURETIES.—Stay of execution being a consideration of great value, sureties who execute an undertaking therefor have a right to rely upon the letter of their bond, and to stand upon the entirety of the expressed consideration therein, and their liability cannot be extended by implication.

APPEAL—STAY BONDS—RELEASE OF SURETIES.—Sureties who execute a stay bond in consideration of stay of execution pending the determination of an appeal are released from liability to pay the judgment appealed from upon its affirmance, by levy and sale under execution of the property of the judgment debtor before

the appeal is determined, although such sureties have failed to justify on the bond as required by statute, after exception to their sufficiency has been made in due form.

APPEAL—STAY BONDS—RELEASE OF SURETIES—CERTIORARI.—The action of the trial court in entering judgment against sureties on a stay bond on appeal after the property of the judgment debtor has been levied upon and sold under execution before the determination of the appeal, whereby the sureties are released from liability, is in excess of jurisdiction, and may be reviewed on certiorari.

APPEAL—STAY BONDS—RELEASE OF SURETIES.—The sureties on a stay bond on appeal are released from liability if execution is issued on the judgment and levied before the determination of the appeal, notwithstanding the stay, and the fact that sale under the execution is prevented by an injunction to which the sureties are not parties is immaterial, and does not affect their liability thus released.

E. N. Harwood and R. McBride, for the relators.

A. J. Campbell and S. Fox, for the respondent.

⁴⁵³ HUNT, J. The consideration of the undertaking of these relators was a stay of execution pending the determination of the appeal from the district to the supreme court in the case of Beck v. O'Connor, 21 Mont. 109. If no stay could have been had until the judgment of this court was rendered, the sureties might never have executed the bond. Certain present conditions often exist under which a man will assume a liability upon an appeal and stay bond which under other circumstances he would not. The suspension of a levy under an execution against a judgment debtor until his appeal can be heard by the supreme court may operate so advantageously to such an appellant as to impose upon the sureties on the stay bond comparatively slight risk of eventually having to pay the judgment appealed from should the same be affirmed; while a levy before the appeal is heard and determined might have the effect of ruining the appellant, and removing every opportunity, otherwise close at hand, to prepare himself to pay the judgment, if affirmed, and to protect his sureties against payment on their part. Stay of execution being a consideration of great value, sureties who execute an undertaking therefor have a right to rely upon the letter of their bond, and to stand upon the entirety of the expressed consideration therein, and their liability cannot be extended by implication: Smith v. Lovell, 2 Mont. 332. This principle is formulated in sections 3680 and 3681 of the Civil Code, which provide that a surety cannot be held beyond the express terms of his contract, and that, in the

interpretation of the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. In the application of these general rules it is necessary that relators be secured the consideration, and the entire consideration named in the express terms of their bond or undertaking, unless they have done that which has excluded them from the benefits of the rules. Let us see if they have. The record shows that they agreed that, in consideration of a stay of execution of the judgment appealed from, they became bound in the sum named in the undertaking that if said judgment appealed ~~454~~ from, or any part thereof, was affirmed, or the appeal was dismissed, by the supreme court appellant Beck would pay respondents Cooper and O'Connor the amount directed to be paid and all damages and costs awarded against appellant on the appeal. They did not agree to pay if any stay was given, but did if a stay was given until the appeal was affirmed or dismissed by the supreme court.

But what occurred? Nearly a whole year before this court handed down its opinion in the appealed suit of Beck v. O'Connor, 21 Mont. 109, affirming the judgment of the lower court, execution on the judgment appealed from had been issued by an order of the district court, made at the instance of respondents Cooper and O'Connor, the property of the appellant Beck had been levied upon and sold, and the proceeds of such sale had been applied on the judgment appealed from. So far, this action of respondents was in total disregard of the contract of the sureties, and put the respondents in an attitude of announcing to the sureties that, as respondents, they would no longer rely upon the undertaking for a stay, but had abandoned the same, and had resorted to their execution by levying upon the appellant's property.

Now, we inquire whether the bondsmen can avail themselves of this action of respondents to claim exoneration from liability on the stay bond. Counsel say the sureties cannot, even though their contract is express in its terms, because of their omission to justify on the stay bond, as required by section 1732 of the Code of Civil Procedure, after exception to their sufficiency was made in due form by O'Connor and Cooper. This omission, it is argued, was the sureties' own act, and, because of it execution was no longer stayed; wherefore it is concluded that O'Connor and Cooper respondents in the appealed suit, had a right to proceed under the execution, and, if the judgment was not satisfied by the execution against

Beck, they could still hold the sureties should the judgment be affirmed on appeal to this court. This argument has an unsound basis for it necessarily involves the proposition that a justification to an undertaking, if required of the sureties ⁴⁵⁵ after they have been excepted to, becomes so blended with the undertaking itself that nonobservance of the statute requiring the justification not only fails to longer stay the execution, but reaches to the letter of the undertaking itself, by importing into its terms an agreement to pay the judgment appealed from, if affirmed or dismissed, notwithstanding the fact that the express consideration of a stay pending the determination of the appeal by this court has failed. The exact fault of this reasoning seems to us to lie in a confusion of the consequences of a failure on the part of sureties to justify with those following the levy of an execution by respondents before the appeal is determined by this court. Mere failure to justify does not relieve the sureties guilty of the omission, and constitutes no defense against their liability: *Blair v. Hamilton*, 32 Cal. 50; *Murdock v. Brooks*, 38 Cal. 596. Their contract to pay the judgment appealed from, upon affirmance or dismissal thereof, is not at all affected (*People v. Shirley*, 18 Cal. 121; *Lee v. Watson*, 15 Mont. 228), nor is their obligation in the least lessened, by neglect to prove their solvency, provided the consideration of a stay is not taken away from them by the voluntary act of the respondents. The statute requiring a justification is directory, and meant to be for respondents', not appellant's, benefit. Respondents here could have waived the statutory provisions entirely by never moving to have the sureties justify; yet the sureties' undertaking would have stood as of full force and effect so long as its consideration was not impaired, until the determination of the appeal or the dismissal thereof by this court. We do not question the correctness of the doctrine recognized in *Moffat v. Greenwalt*, 90 Cal. 371, which will not allow sureties on a stay bond to claim release where, through their own omissions, they have failed to justify under a statute like section 1732, requiring them to do so if their sufficiency is excepted to. Unquestionably, that is the law. But that rule does not conflict at all with the right of sureties to have the stay of execution granted and named as the consideration of their undertaking, if they are to be called upon to pay the judgment ⁴⁵⁶ when affirmed; and it is this right that these sureties have never waived. It was not, therefore, the nonobservance of the statute which relieved

the sureties of liability at all, for it did not; but it was the act of the respondents in levying the execution against the property of the judgment debtor, and selling the same when they need not have done so, and should not, if they meant to rely upon the sureties' undertaking for a stay, executed for their benefit. Respondents had a right, under section 1732 of the Code of Civil Procedure, to proceed with the execution after the time had elapsed in which the sureties should have justified, no matter whether the appeal had been heard or not; for execution was no longer stayed, and, under such circumstances, the sureties could have interposed no obstacle to the levy upon the appellant's property; but, in pursuing that course, they destroyed the consideration named in the sureties' contract, deprived them of the benefit of it, and, having done so, they cannot now fix the sureties' liability under contingencies not embraced in their undertaking or the several statutes, including sections 1726 and 1730 of the Code of Civil Procedure, with relation to which the undertaking was given. Having made their election to proceed with the levy and sale thereunder, we think they chose to treat the stay bond as ineffectual, and we hold that they have waived their right to a judgment against the sureties. As bearing more or less upon the case, we cite *Columbia etc. R. R. Co. v. Brillard*, 12 Wash. 22, and *Powers v. Chabot*, 93 Cal. 266.

It is hardly necessary to add that, in discussing the liability of the sureties on the stay bond, we do not mean to imply that the bond is not good to perfect the appeal itself. We believe it is: *Schacht v. Odell*, 52 Cal. 447; *Hill v. Finnigan*, 54 Cal. 311; *Hayne's New Trial and Appeal*, 678. Our opinion only goes to the effectiveness of the obligation to secure the ancillary relief of staying execution on the judgment from which the appeal is prosecuted.

2. As to remedy by certiorari: Was the action of the district court in entering judgment in favor of the respondents ⁴⁵⁷ *Beck and O'Connor*, against the sureties on the stay bond, in excess of the jurisdiction of that court? We believe it was. As hereinbefore decided, when the respondents proceeded with the levy and sale, they elected to abandon the security of the stay bond, and released the sureties upon their undertaking to pay the judgment affirmed by this court. Respondents' position became analogous to that of a plaintiff who dismisses one of two causes of action against a defendant. This he may do according to the provisions of the code: Code

Civ. Proc., sec. 1004; and if he so acts defendant is no longer bound to pay attention to that cause which plaintiff has dismissed: *Loeb v. Willis*, 100 N. Y. 235. Relator's case is stronger, however; for, until the judgment appealed from was affirmed by this court, and until the remittitur was filed with the clerk of the district court, and until appellant had failed for thirty days thereafter to pay the judgment, no judgment could have been rendered against the sureties, for until then the court acquired no jurisdiction over their persons, under the stipulations of their contract or otherwise. Furthermore, at that time they were under no obligation to go into the district court, for the reason that the records of that court showed the prior order authorizing execution and levy, together with the fact of levy and sale, which (always considering the bond for a stay only) operated as a complete release to the sureties, and put them beyond the jurisdiction of the court in subsequent ex parte proceedings attempted to be had against them under the terms of the stay bond and the statute under which the bond was given: *Watts v. Overstreet*, 78 Tex. 571. The contingencies necessary to happen before the sureties' liability was fixed had not only failed to happen, but, by respondents' prior action, they had been prevented from happening; and, in our judgment, the court had lost jurisdiction over these relators.

The case is one, therefore, where the action of the court in entering judgment against the sureties and authorizing execution thereunder to be issued, was more than a mere irregularity or error of law occurring in the course of proceedings which the court was authorized to conduct, and amounted to an excess of the power of the court, and became subject to be reviewed by this writ.

It is therefore ordered that the judgment and order of the district court in and for Carbon county, made and entered on November 21, 1898, against these relators as sureties upon the stay bond in the case of *Beck v. O'Connor*, 21 Mont. 109, in so far as it affects said relators as sureties on the stay bond, be, and the same is hereby, set aside and annulled.

Brantly, C. J., and Pigott, J., concur.

ON PETITION FOR REHEARING.

PER CURIAM. Defendant's counsel pray for a rehearing, calling our attention to the fact that it appears by the record in the case of *Beck v. O'Connor*, 21 Mont. 109, cited in the

opinion, that on May 18, 1897, execution was issued directed to the sheriff of Gallatin county, who levied upon and advertised for sale certain real estate of Beck, but that about July 1, 1897, Beck caused a writ of injunction to be issued out of the district court of Gallatin county restraining the sheriff from making a sale; whereupon the sheriff returned said execution without making such sale or the sale of any property under the execution. The district court dissolved the injunction, but continued it in force pending an appeal to this court. On appeal, the order of the lower court dissolving the temporary injunction order was affirmed on May 9, 1898: *Beck v. Fransham*, 21 Mont. 117. It therefore appears that no property was ever sold under the execution issued to the sheriff of Gallatin county, nor was any other execution issued until after the judgment in the case of *Beck v. O'Connor*, 21 Mont. 109 was affirmed by this court on May 9, 1898.

These dates and facts disclose that the petition of relators for the writ of certiorari erred in its allegation that the ⁴⁵⁹ "property of said plaintiff and appellant William Beck was seized and sold thereunder during the pendency of said appeal." In their brief, also, relators made the same mistake, and, as no correction of the statements was made by defendant before the submission of the case, we took the averment of the petition to be in exact accord with the record, and relied thereon as an admitted fact. It is conceded that the mistake was inadvertently made and overlooked by the respective counsel, but, now that it is brought to our attention, we are pleased to rectify it.

However, after consideration of the facts as modified, we are unable to change our opinion as to the legal principles applicable to the case. It matters not that the judgment debtor Beck insisted in *Beck v. Fransham*, 21 Mont. 117, that the execution of the bond operated as a stay, notwithstanding the fact that the sureties failed to justify, for his contention could not modify the contract of, or impose any liability upon, the sureties on the stay bond not included in the bond itself, and it is the sureties' rights which are here involved. *O'Connor* and *Cooper*, having caused the execution to issue and the property of Beck to be levied upon pending the appeal, must be regarded as having elected to release the sureties, and as having waived their rights to thereafter insist upon the sureties' liability; and it matters not that an actual sale was prevented, the intervention through which the sale was stopped having been a pro-

ceeding to which the sureties were not parties and with which they had nothing to do.

O'Connor and Cooper cannot play fast and loose by suing out and levying execution, thus violating the contract, yet afterward have it enforced for the reason that execution was stayed, the stay not having been procured at their instance. If the property of Beck turned out to be insufficient to pay the judgment, the sureties ought not to be responsible for the deficiency, for they had long before been released by the acts of O'Connor and Cooper.

The motion must be denied.

APPEAL BONDS.—THE CONTRACT OF A SURETY on an appeal bond should be strictly construed; the surety is entitled to stand upon the express terms of his contract: *Monographic note to Howell v. Alma Milling Co.*, 38 Am. St. Rep. 702, 703.

APPEAL BONDS—WAIVER.—The giving of an undertaking on appeal is jurisdictional, and cannot be waived by the respondent: *Brown v. Chicago etc. Ry. Co.*, 10 S. Dak. 633, 66 Am. St. Rep. 730.

APPEAL BONDS—RELEASE OF SURETIES.—Justification forms no part of the sureties' contract, and their liability still exists, though the appeal has been dismissed on account of their failure to justify, after an exception to their sufficiency: *Note to Howell v. Alma Milling Co.*, 38 Am. St. Rep. 708. See this note, pages 702-719, for an extended discussion of the liability of sureties on appeal bonds.

KENCK v. PARCHEN.

[22 MONTANA, 519.]

EXECUTORS AND ADMINISTRATORS—LIABILITY OF SURETIES.—The sureties on a joint and several administrator's bond are liable thereon, although it was signed by them on condition that it should be signed by the administrator before delivery, and such condition was not complied with.

EXECUTORS AND ADMINISTRATORS—LIABILITY OF SURETIES.—If a joint and several administrator's bond is signed by the administrator in the body thereof before delivery, the delivery without his signature at the end is not a violation of an agreement with the sureties that the bond is not to be filed until the administrator has signed it.

BONDS—SIGNATURE OF PRINCIPAL.—It is immaterial where the signature of a party to a bond is placed. It is as binding if found anywhere else upon the paper as it is when appearing at the end provided that such party intended to be bound by his signature so placed.

JUDGMENTS AGAINST ADMINISTRATORS—CONCLUSIVENESS AGAINST SURETIES.—A judgment against an administrator in a probate proceeding determining the amount of his in-

debtedness to the estate is conclusive as against the sureties on his bond, and cannot be inquired into collaterally.

Toole & Wallace, for the appellants.

T. J. Walsh, for the respondent.

522 PIGOTT, J. From June 23, 1888, to January 28, 1893, defendant Yaeger was administrator of the estate of William Craigie, deceased. On the day last mentioned his letters were revoked, and on June 12th following plaintiff qualified. On December 2, 1895, in a proceeding against Yaeger for an accounting touching his administratorship the court found that on September 1, 1889, he had converted to his own use two thousand two hundred and fifty-six dollars of the money of the estate, which sum, with interest thereon at the rate of six per cent per annum from October 1, 1889, amounting in all to three thousand and ninety dollars and seventy-two cents, he still owed the estate; and judgment against Yaeger was rendered accordingly. To recover the sum so adjudged due from Yaeger, this action was brought against him and his sureties on his official bond, of which the following is a copy:

"Know all men by these presents, that we, Henry C. Yaeger, as principal, and T. H. Kleinschmidt and Henry M. Parchen, as sureties are held and firmly bound to the territory of Montana in the sum of five thousand dollars, lawful money of the United States of America, to be paid to the said territory of Montana, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this twentieth day of June, 1888.

"The condition of the above obligation is such that whereas, by an order of the probate court of the county of Lewis and Clarke, territory of Montana, duly made and entered on **523** the thirteenth day of June, 1888, the above-bounden Henry C. Yaeger was appointed administrator of the estate of William Craigie, deceased, and letters of administration were directed to be issued to him upon his executing a bond, according to law, in said sum of five thousand dollars.

"Now, therefore, if the said Henry C. Yaeger, as such administrator, shall faithfully execute the duties of the trust according to law, then this obligation to be void otherwise to remain in full force and effect.

"T. H. KLEINSCHMIDT. [Seal]

"H. M. PARCHEN. [Seal]"

Yaeger presented the bond to the probate judge, who approved it on June 23d, and the clerk, after filing it, issued letters to Yaeger, who had already taken the oath prescribed.

The sureties answered denying that Yaeger converted any funds of the estate. They interposed also the following plea: "Deny that these answering defendants ever executed, made, or delivered the said alleged bond set forth in paragraph 3 of said complaint; and, while admitting that they signed the same, they aver that they signed the same without intending to enter into any independent undertaking for themselves, and upon the express condition and direction to the defendant Yaeger that the same should not be filed with the probate court until said Yaeger himself had signed the same as principal, and that the said Yaeger was so named as a party to said bond upon the face thereof, but that he never signed or executed the said bond."

Trial was by the court without a jury. The testimony of the sureties tended to show this state of facts: When Yaeger presented the bond to them for their signatures he had already filled in the blanks in the bond, with the exception of the names of the sureties. His own name, which appears three times in the bond, was written therein by himself. Entertaining the opinion that the bond would not be an obligation binding Yaeger, and that they would be principals and have no recourse to him thereon, unless his name were subscribed thereto, the sureties signed the bond and delivered it to Yaeger, ⁵²⁴ with secret instructions not to file it until signed by him. Yaeger never subscribed the bond. The court found that the sureties signed the bond upon the express condition between themselves and Yaeger that the same should not be filed with the probate court until Yaeger had subscribed the bond, and that the approval and filing of the same by the probate judge and clerk was without the knowledge of the sureties, but held that the sureties were nevertheless liable. Judgment was entered accordingly for three thousand three hundred and forty-one dollars and ten cents, including interest; from which, and from an order denying their motion for a new trial the answering defendants appeal.

1. The first assignment is, that the court erred in rendering judgment for any amount against the sureties on the bond, it being insisted that the instrument sued on is, under the facts stated, not enforceable against them, because they did not con-

sent to its delivery. This condition is disposed of adversely to defendants in *Woodman v. Calkins*, 13 Mont. 363, 40 Am. St. Rep. 449, and *Cockrill v. Davie*, 14 Mont. 131. The cases of *Hart v. Mead Inv. Co.*, 53 Neb. 153, *Byers v. Gilmore*, 10 Colo. App. 79, and *Doorley v. Farmers' etc. Lumber Co.*, 4 Kan. App. 93, are likewise in point and to the same effect: See, also, *Kurtz v. Forquer*, 94 Cal. 91. Were the bond joint only, and not joint and several, different principles might perhaps be applicable, as was held in *Weir v. Mead*, 101 Cal. 125, 40 Am. St. Rep. 46.

For another reason the assignment is without merit. The answer, as will be observed, avers that the sureties signed the bond upon the condition that Yaeger should also sign it, and that they did not consent to the delivery without his signature. Yaeger did effectually sign the bond by writing his own name three times in the body of the bond, and delivering it to the probate judge, thereby adopting the signatures written by him: *McLeod v. State*, 69 Miss. 221. It is, as a matter of law, immaterial where the signature be; it is as binding when found anywhere else in the paper as it is when appearing at the end, "the question being always open ⁵²⁵ to the jury whether the party, not having signed it regularly at the foot, meant to be bound by it as it then stood, or whether he left it so unsigned because he refused to complete it": *Johnson v. Dodgson*, 2 Mees. & W. 653; *State v. Hill*, 47 Neb. 456. The answer states that the condition imposed on, and the direction to, Yaeger was that the bond should not be filed with the probate court until he had signed it, not that the subscription must precede the filing. The delivery of the bond was not, therefore, a violation of the condition pleaded: *State v. Hill*, 47 Neb. 456.

2. The remaining assignment is, that the court erred in rendering judgment for any amount above two thousand two hundred and fifty-six dollars, and interest from December 14, 1895, when the demand was first made on appellants. This question was presented in *Botkin v. Kleinschmidt*, 21 Mont. 1, 69 Am. St. Rep. 641, where it was, in effect, decided that a judgment against an administrator in a probate proceeding of the character of the one involved here is conclusive as against the sureties, and cannot be inquired into collaterally; and we affirm the doctrine there declared.

The judgment and the order denying a new trial are affirmed.

Brantly, C. J., and Hunt, J., concur.

BONDS—SUFFICIENCY OF SIGNATURE.—If a surety does not sign at the foot of a bond, but writes his name in a blank left at the head of the bond for the names of obligors, there is a good execution of the bond as to him: *Benedict v. Hood*, 134 Pa. St. 289, 19 Am. St. Rep. 698.

AN ADMINISTRATOR'S BOND, purporting to be the joint obligation of the principal and sureties and the several obligation of the latter, if not signed by the principal, is void, though letters of administration are issued to him and he receives and misappropriates the estate of the decedent: *Weir v. Mead*, 101 Cal. 125, 40 Am. St. Rep. 46; but see important note thereto.

A JUDGMENT AGAINST AN ADMINISTRATOR or executor for money due from him to the estate is binding upon the sureties on his bond, and cannot be collaterally attacked in an action on the bond: *Nevitt v. Woodburn*, 160 Ill. 203, 52 Am. St. Rep. 315.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

WHITE *v.* UNDERWOOD.

[125 NORTH CAROLINA, 25.]

PROCESS—SERVICE OF IN JAIL.—The sheriff has authority to serve process in jail as well as elsewhere. The jail possesses no "privilege of a sanctuary," and service of process upon a prisoner confined therein is valid.

PROCESS—EXEMPTION FROM SERVICE—PRISONER IN JAIL.—The reasons for exemption from civil arrest and from service of any civil process of nonresident parties, and witnesses voluntarily attending court, do not apply to persons arrested and in jail under a criminal proceeding.

Winborne & Lawrence, for the appellant.

D. C. Barnes, for the appellee.

²⁶ CLARK, J. The summons in this action and an order of arrest and bail ancillary thereto were served upon the defendant while confined in jail upon failure to give bond for his ²⁷ appearance to answer a criminal charge for some secret assault: Code, sec. 131.

The sheriff has authority to serve process anywhere in his county, in jail as well as elsewhere. The jail possesses no "privilege of sanctuary." The reason for the exemption of witnesses and jurors from civil arrest (Code, secs. 1367, 1735), and of nonresident parties and witnesses voluntarily attending court—here from service of any civil process (Cooper *v.* Wyman, 122 N. C. 784, 65 Am. St. Rep. 731), do not apply to parties arrested in criminal proceeding: Moore *v.* Greene, 73 N. C. 473. There is no public policy to encourage the latter.

In Davis *v.* Duffie, 1 Abb. App. Cas. 486, 4 Abb. Pr., N. S., 478, it is said by the court of appeals of New York, affirming

the same case, 8 Bosw. 617: "It was decided in *Phelps v. Phelps*, 7 Paige, 150, that service upon a convict in a state prison, as in this case, was regular and valid to confer jurisdiction; and this has been the settled rule of law and practice both in England and in this country for a long period of time: 2 Madd. Ch. Pr. 200; 1 Hoff. Ch. Pr. 109; 1 Barb. Ch. Pr. 50. Even if Davis could be deemed civilly dead, as would have been his condition had he been sentenced to imprisonment for life (2 Rev. Stats., sec. 20, p. 701), still he would have been answerable to his creditors according to the usual practice of the courts. Chitty says: 'This situation of civiliter mortuus is never allowed to protect him from the claims of private individuals or the necessities of public justice; so that although he can bring no action against another, he may be sued, and execution taken out against him.' See, also, remarks of Chancellor Kent in *Platner v. Sherwood*, 6 Johns. Ch. 130. Indeed, the decisions are uniform, that although the right of a convict to prosecute an action is suspended and his property in some instances forfeited, still he may be sued and the suit against him may be prosecuted to judgment."

²⁸ In *Dunn's Appeal*, 35 Conn. 82, it was held that where a defendant was in jail under sentence, leaving a copy of a paper at the jail was compliance with a statute requiring service by "leaving a copy at usual place of abode."

No complication can arise from the defendant's being under arrest at the same time in the criminal action and in this proceeding. The same condition arises whenever a defendant is under arrest on two or more criminal warrants. As long as he remains in jail on the warrant in the criminal action, he need give no bail in the civil action, and when released in one he has the opportunity to give bail in the other. If service of the order of arrest had been invalid, the motion for an alias order should have been allowed "at any time before judgment": Code, sec. 295.

In holding the service of summons and of the order of arrest and bail void, and in vacating the said order, there was error, and an appeal lay: *Fertilizer Co. v. Grubbs*, 114 N. C. 470.

Reversed.

PROCESS.—ONE IS NOT PRIVILEGED from service of civil process after a discharge on a recognizance from a criminal charge: *Moore v. Green*, 73 N. C. 394, 21 Am. Rep. 470; or after trial and acquittal, or trial and conviction, or on being brought into the state as a fugitive from justice: Note to *In re Healey*, 38 Am. Rep. 720. But see *Palmer v. Rowan*, 21 Neb. 452, 59 Am. Rep. 844; *Holker v. Hennessey*, 141 Mo. 527, 64 Am. St. Rep. 524.

JENKINS v. DANIEL.

[125 NORTH CAROLINA, 161.]

SURETYSHIP—RELEASE OF SURETY—EXTENSION OF TIME.—An extension of time, without the consent of the surety, discharges him or the security given by a third party.

SURETYSHIP—RELEASE OF SURETY BY EXTENSION OF TIME.—If a wife unites with her husband in the execution of a mortgage on her land to secure his debt, and signs his note as surety therefor, any extension of the time for payment without her consent discharges the lien on her land. After such extension the mortgagee has no right to sell the land, and the purchaser at the sale acquires no title.

SURETYSHIP—MORTGAGE TO SECURE SECURED DEBT—COLLATERAL SECURITY.—If a mortgage is given by the principal debtor to secure other indebtedness, and a former secured debt is included in the mortgage, the foreclosure of which is at a later date than the maturity of the doubly secured debt, the mortgage must be held to be collateral security to the doubly secured debt only, and not an extension of time releasing the surety, in the absence of an agreement to the contrary.

MORTGAGES—TITLE OF PURCHASER—ACCOUNTING. If a wife signs her husband's note as surety, and unites with him in the execution of a mortgage on her land to secure his debt, and he then gives a second mortgage to the same mortgagee to secure other indebtedness, and as additional security for such note, a sale under the first mortgage to pay off a balance due on the note passes title to the purchaser in fee, clear of any claim for rent or waste, but, as between the mortgagors and mortgagee, the latter is liable to account for the price of the land sold, less the amount of the note.

G. M. Lindsay, for the appellants.

H. G. Connor, for the appellees.

¹⁶⁵ FURCHES, J. On the 10th of August, 1888, the plaintiff John H. Jenkins borrowed of A. N. Daniel, the testator of ¹⁶⁶ the defendant Ida Daniel, the sum of one hundred and fifty dollars, for which the said J. H. Jenkins and his wife, Mary F., executed their note to the said A. N. Daniel, due the first day of January, 1890; that at the same time they made and executed a mortgage to the said Daniel upon the land in controversy to secure the payment of said note and some other indebtedness; that the land so conveyed in said mortgage belonged to the feme, Mary F., then the wife of the said John H. Jenkins; that on the twelfth day of February, 1890, the said John H. Jenkins executed a chattel mortgage and crop lien to said A. N. Daniel, in which it is stated to be "in consideration of twelve dollars, and one note due Bynum & Daniel, and one due A. N. Daniel, as described in the mortgage of February,

22 and August 10, 1888, . . . and the further sum of one hundred and fifty dollars, to be advanced from time to time during the year as needed," conveying the following property: "One mule, two iron axle casts, three head of cattle, one sow and pigs, all farming implements, one bay mare about eleven years old, and all other personal property of every description, not herein mentioned or described, also a lien on all crops, etc. . . . And if by the fifteenth day of November, 1890, the aforesaid indebtedness has not been discharged by the proceeds of the sale of said crops or otherwise, then the party of the second part is authorized to take possession of said property and sell the same, or so much thereof as will satisfy the amount then remaining due, and all costs and expenses in any way incurred by said seizure and sale. But if said indebtedness shall be paid off and discharged by the fifteenth day of November, 1890, then this conveyance to be null and void."

On the fourth day of July, 1891, the wife, Mary F., died, leaving her husband, J. H. Jenkins and the infant plaintiff, her surviving; and in February 1892, the mortgagee sold the ¹⁶⁷ land at public auction on the premises, when the defendant Mrs. Sarah Speight, wife of the defendant J. Y. Speight, became the purchaser at the price of three hundred and twenty dollars, and has paid the purchase money, and the mortgagee made her a deed therefor. The plaintiff J. H. Jenkins was present at the sale and made no objection thereto. All the children and heirs at law of Mary F. Jenkins were then, and seem to be still, minors under twenty-one years of age, and sue by their guardian, J. H. Jenkins. The mortgagee, A. N. Daniel, before the date of said sale, to wit, on the first day of April, 1891, caused to be canceled all the mortgages he had against the plaintiff J. H. Jenkins except that of the 10th of August, 1888, under which the sale was made, and the defendant Speight bought.

The plaintiffs admit in their complaint that there was about two hundred dollars due on the note of the 10th of August, 1888, at the date of the sale. But they allege that, as no place was named in the power of sale contained in the mortgage, the sale should have been made at the courthouse in Greene county; that on account of the sale not having been so made, the land sold for much less than its value; that defendant Speight has been in possession of the land ever since the sale, receiving the rents and profits, and has damaged the land by tearing away the fences, and has cut and sold a quantity of timber off the

land, which, when taken together, amount to more than the balance due on the note of one hundred and fifty dollars, which should be applied to its discharge. The plaintiff further contends that the discharge of the other mortgages in which the one hundred and fifty dollars was secured was a discharge of the debt and lien upon the land of the wife, Mary F. Jenkins, and mother of the other plaintiffs, and they contend on the argument here that the mortgage of February, 1890, extended the time for enforcing the mortgage of the 10th of August, 1888, and that the mortgage security was thereby ¹⁶⁸ discharged; that the mortgage only conveyed a life estate in the land.

Of these many contentions of the plaintiffs there is but one about which it seems there should be any doubt, and that is the extension of time caused by the mortgage of February, 1890.

It is admitted by the plaintiff that there was about two hundred dollars due on the note of one hundred and fifty dollars at the date of the sale; and this being so, it authorized the sale: *Jordan v. Farthing*, 117 N. C. 181, where it is held that if one dollar is due it authorized the sale. This was said in a case where there was no claim that the lien of the mortgage had been discharged, and that contention is the serious element that enters into this case. The debt secured was that of the husband, and the land mortgaged as security was that of the wife, and was only security for the husband's debt: *Sherrord v. Dixon*, 120 N. C. 60.

The extension of time without the consent of the surety discharges the surety, or the security given by a third party: *Bank v. Summer*, 119 N. C. 591; *Sutton v. Walters*, 118 N. C. 495.

This presents the question whether the mortgage of February, 1890, extended the time of payment of the note of the 10th of August, 1888, secured in both mortgages. If it does, it was a discharge of the lien of the mortgage of the wife on her land. The mortgagee would have no right to sell under the same, and the defendant Speight would acquire no title by reason of said sale and her purchase.

It is held in *Harshaw v. McKesson*, 65 N. C. 688, that time for the payment of the debt secured by the mortgage, in that case, was extended. But in that case the time was extended by the express terms of the mortgage; the mortgage was given to secure a debt then past due and unsecured, ¹⁶⁹ and the court held that the time agreed to be given was the only consideration for giving the mortgage.

It is also held in *Kane v. Cortesy*, 100 N. Y. 132, that giving a second mortgage securing a debt secured by a former mortgage, in which the time stated for the foreclosure of the second mortgage was at a later date than that fixed in the former mortgage, was an extension of time of payment, and discharged the lien of the first mortgage. This case, it must be admitted, is very much like the one under consideration.

While, on the other hand, it is distinctly held not to be an extension of time in *Emes v. Weddowson*, 19 Eng. Com. L. 316, in a case very much like the one now under consideration, where it is said "that an assignment of property for the purpose of securing debts due and to be due, with a power of sale upon giving six months' notice, is only a collateral security, and, without a special clause to that effect, does not suspend the remedy by action against the debtor."

The same doctrine is held to be the law in 2 *Brandt on Sureties and Guaranties*, section 367, to wit: "It has been repeatedly held that the mere fact that the creditor takes from the principal a mortgage or trust deed of property as collateral security for the debt, does not of itself, in the absence of an agreement to that effect, extend the time or discharge the surety."

In *Meguiar v. Groves*, 1 Fed. Rep. 279, it is said: "The giving of a chattel mortgage to secure a pre-existing debt will not discharge sureties of the debtor, unless the mortgage on its face purports to extend the time of payment of the debt."

Where a mortgage is given by the principal debtor to secure other indebtedness, and a former debt is included in such mortgage, which already has security, and the time of foreclosure of said mortgage is at a later date than the maturity ¹⁷⁰ of the doubly secured debt, this mortgage will be held to be only collateral security to the doubly secured debt, and not an extension of time, unless it be agreed as a consideration that the time for the enforcement of the doubly secured debt should be extended, and that such second mortgage did not discharge the original security: 2 *Brandt on Sureties and Guaranties*, sec. 367.

The case of *Harshaw v. McKesson*, 65 N. C. 688, is distinguishable from this case and cannot control our opinion here. In that case there was an express agreement for an extension of time, which was the only consideration for the mortgage. That is not so in this case. Here, the second mortgage is given to secure other indebtedness, and for the purpose of obtaining future advances to make a crop. There is no contract or stipu-

lation or agreement to extend time on the note for which the former mortgage was given, and we cannot, by construction, give it that meaning and effect.

It seems to us that this second mortgage was, or might have been, a benefit to the first security, as it became an additional security for the debt, furnished by the principal debtor which the original security could have compelled the trustee mortgagee to exhaust before the first mortgage would be liable. But this was a matter between the first security and the mortgagee, and does not extend to the purchaser at the mortgage sale, as it is admitted that there was a considerable balance due on the first mortgage debt at the time of the sale. The mortgage conveyed the fee simple estate under section 1280 of the code.

We do not think the other grounds urged by plaintiff invalidate the sale. It is found by the referee to have been open and fair, and that the plaintiff J. H. Jenkins was present and did not object; that the land brought a fair price, and, according to the evidence (in the opinion of the intelligent referee), as much as it would have brought if sold at the courthouse ¹⁷¹ of Greene county, which was a considerable distance from the land; and that there was no place specified as to where the sale should take place.

The sale being valid, it conveyed the title to the land to the purchaser, Speight, free of any trust relations between her and the mortgagors, and she is not liable to account for rents and profits or for waste.

But as between the mortgagors and mortgagee, between whom the trust relations existed, the mortgagee is liable to account to the mortgagors for the price the land sold for, and also for the property conveyed in the second mortgage; and whatever is found to be due, if anything, will inure to the benefit of the infant plaintiffs to the value of the land. And the defendant Ida Daniel being the representative of the trustee, it will devolve upon her to account for these funds: *Hall v. Lewis*, 118 N. C. 517; *McLeod v. Bullard*, 84 N. C. 515.

It was suggested by defendant on the argument that in any event J. H. Jenkins had conveyed his interest, which, according to plaintiffs' contention, was a life estate (tenant by the curtesy), and that plaintiff could not recover on that account, as that estate had not terminated. However this may be (and we do not decide it), we have preferred to put our judgment upon the merits of the case as affecting the rights of the parties. That the judgment of the court below be affirmed as to the

defendants Speight and wife. But if the plaintiffs are so advised, the case should be continued as to the defendant Daniel, that the matters may be inquired of, as indicated in this opinion.

Modified and affirmed.

SURETY, RELEASE OF BY EXTENSION OF TIME.—A surety is discharged if the creditor, without the consent of the surety, gives further time for payment to the principal: *Hallock v. Yankey*, 102 Wis. 41, 72 Am. St. Rep. 861, and note; *Merriam v. Miles*, 54 Neb. 566, 69 Am. St. Rep. 731, and note.

SURETYSHIP.—TAKING A MORTGAGE from the principal debtor or a stranger does not preclude the creditor from suing upon the first contract, and consequently does not discharge the sureties upon it: *Burke v. Cruger*, 8 Tex. 66, 58 Am. Dec. 102. And if the principal gives non-negotiable collateral security, the fact that the new security does not fall due till after the maturity of the original obligation does not release the sureties on it: *Extended note to Lindeman v. Rosenfield*, 33 Am. Rep. 85. See, also, *Phoenix Brewing Co. v. Rumbarger*, 181 Pa. St. 251, 59 Am. St. Rep. 647.

SURETY, MARRIED WOMAN AS—RELEASE.—If a married woman, without consideration to herself, joins with her husband in a mortgage of his land, whereby they covenant to pay the mortgage debt, which is evidenced by a note signed by him alone, she becomes a surety and is entitled to all the rights of a surety. Hence the discharge of the husband, the principal debtor, releases her: *Siebert v. Quesnel*, 65 Minn. 107, 60 Am. St. Rep. 441.

BURNEY v. ALLEN.

[125 NORTH CAROLINA, 314.]

WILLS—WITNESSES.—The testator must actually have seen, or have been in a position to see, not only the witness but the writing paper itself, at the time the witnesses signed the instrument, in order to constitute it a valid will.

WILLS—WITNESSES—REQUEST TO SIGN.—A testator is not required to request the witnesses to subscribe to his will. Such request may be implied from his conduct, or well-understood signs, or it may be made by another, in the presence of the testator with his knowledge and acquiescence.

C. C. Lyon and Jones & Stewart, for the appellant.

R. O. Burton, for the appellees.

315 MONTGOMERY, J. Nathan Jones, one of the subscribing witnesses to the script which purports to be the last will and testament of the decedent Henry Allen, testified that he subscribed it in the presence of the decedent and at his request, and in the presence of W. F. Devane, the other subscribing

witness; and that Devane also subscribed it in the presence of the decedent and at his request. Devane testified as follows: "I was witness to Henry Allen's will; I signed it in the presence of the testator, Nathan Jones, and A. M. McNeill. Emma Jones came for me and I went to Allen's house; Emma Jones is sister to widow Allen. When I went don't recollect that Henry Allen spoke to me; I don't think he spoke to me at all. I saw him when he signed the will; he was lying flat on his back when he signed it. Allen made his mark; I don't know what I signed; I asked McNeill to let me read it, but he said it was not necessary. I do not know whether Allen could see me when he signed it or not; he could see me, but don't think he could see the paper; he was on the bed in the east corner of the room, and I was at the west corner of the same room, at a table; I was standing with my side or back to him, I don't know which; I am satisfied that he could not see the paper writing at the time I signed it, but he could see me."

316 A. M. McNeill testified: "Allen was very sick and suffered greatly; he was on his bed; I wrote his name and he made his mark to the paper writing; I don't know whether his eyes were open or not; I don't know the condition of his mind; he could have seen the parties when they signed the paper as witnesses, but could not see the paper. Allen did not ask anyone to sign it. I wrote his will at his dictation."

The following issue was submitted to the jury: "Is the paper writing, or any part thereof, the last will and testament of Henry Allen?"

An exception was made by the defendants, the propounders, to that part of the charge of the court which is in the following words: "That the deceased, Allen, must actually have seen, or have been in a position to see, not only the witnesses, but the paper writing itself, at the time the witnesses signed the same, and that if the jury should believe that he did not see the paper writing at the time the witnesses signed it, they should answer the issue, 'No.'"

The instruction was in harmony with the decision of this court made in the case of *Graham v. Graham*, 32 N. C. 219. In that case it appeared that the decedent was very sick and lying in bed at the time the paper writing propounded as the will of the decedent was alleged to have been subscribed by the witness; the witnesses withdrew into another room, and there, at a large chest, signed their names; the testator as he was lying in bed could, by turning his head and looking around the side

of the door between the rooms, have seen the backs of the witnesses as they sat at the chest writing, but he could not have seen their faces, arms, or hands, or the paper on which they wrote, a view of those being obstructed by the partition wall. After the witnesses had signed, they went back with the will into the room where the decedent was, and ³¹⁷ informed him that they had witnessed it, and he asked one of the persons present to take charge of it. Upon that evidence the court directed the jury that "though the testator could have seen enough of the persons of the witnesses while they were subscribing the will to enable him to recognize them, yet if he could not have seen what was going on whilst they were in the act of attestation, the paper was not properly executed and attested." And this court, Ruffin, C. J., delivering the opinion, in reviewing that instruction, declared that while it was a rigid construction of the terms "in his presence" which were used in the act, yet that it was in conformity with the cases theretofore decided on that subject, and that it was consonant with the policy and meaning of the statute. In that opinion, the true principle of the statute was settled to be "that a subscribing by the witnesses must be in such a situation, whether within or without the testator's room, as will enable the testator, if he will look, to see that the paper signed by him is the same which is subscribed by the witnesses. . . . The statute meant that he should have evidence of his own senses to the subscribing by the witnesses just as he should to a signing for him by another by his direction and in his presence, so as to exclude almost the possibility of imposition by substituting one paper for another without detection by the testator himself upon his own ocular observations and without exposing him to any risks from undue confidence"; and the opinion concludes in this language: "We believe, indeed, that there is no instance in which a paper has been sustained where the attestation was under such circumstances that the testator could not see what was done so as to protect himself upon his own knowledge against any dishonest substitution by the people whom he is obliged by the law to select and depend upon as subscribing witnesses to his will."

³¹⁸ In the next volume of our reports, 33 N. C. 632, in the case of *Bynum v. Bynum*, the court, with its personnel unchanged, and the same judge delivering the opinion, reversed the judgment below, because his honor instructed the jury that "as to the formal execution of the script it was not necessary it should be proved that the party deceased saw the paper at the

time it was subscribed by the witnesses, but it was necessary she should be in such a situation that she could see it if she wished; and that, if the jury believed she could not see it at the time, it was not subscribed in her presence within the meaning of the law." In that case, the decedent was raised up in bed and in that position she signed the script and then laid down. The witnesses then subscribed their names in the same room and within two or three feet of the decedent, but the witnesses said that they were not certain whether, from the position in which she was lying, she could see the paper at the time it was being subscribed, and that they thought another paper might have been substituted for the one she signed without her knowing it. In the discussion of that case the court, without in so many words overruling the case of *Graham v. Graham*, 32 N. C. 219, adopted an entirely different course of reasoning, and arrived at an entirely different conclusion from the principle announced in the last-mentioned case.

In *Bynum v. Bynum*, 33 N. C. 632, it is held substantially that, provided the subscribing by the witnesses is done in the same room, "openly and without any clandestine appearance about it," the attestation would be good, whether the decedent could actually see the paper or not. So, too, the declaration in *Graham v. Graham*, 32 N. C. 219, that the testator should have evidence of his own senses—that is, the power to look and see from his present position if he wished to do so—so as to exclude "almost the possibility of imposition by substituting one ³¹⁹ paper for another, without detection by the testator upon his own ocular observation, and without exposing him to any risks from undue confidence," is substituted in the case of *Bynum v. Bynum*, 33 N. C. 632, by the declaration: "It is not, therefore, the feasibility of obtaining another paper which will avoid the attestation when all passes in the same room, so that the party has opportunity of watching for him or herself; for under those circumstances the attestation is *prima facie* good."

In *Jones v. Tuck*, 48 N. C. 202, the principle enunciated in *Graham v. Graham*, 32 N. C. 219, was followed fully, and that case was cited as authority for the decision in *Jones v. Tuck*, 48 N. C. 202.

In *Cornelius v. Cornelius*, 52 N. C. 593, the court instructed the jury that "if they believed that the attestation was made by the subscribing witnesses in the room in which the deceased was lying, and in such a situation as by turning his head in the manner described by them he could see the paper writing at

the time of the attestation, and that he had the ability to do so, there was an attestation in his presence; it was an attestation in his presence as required by the act of assembly." This court said, in reviewing that case, that, "after reviewing the authorities upon this point, we think that the strictest interpretation of the law has gone no further than to require that the testator should be in a position and have power without a removal of his person to see what was done. It is not necessary for him, in point of fact, to see." The court also referred to the opinion in *Bynum v. Bynum*, 33 N. C. 632, where it was held "that the attestation being done openly and without any clandestine appearance about it, in the same room with the testatrix, and within two or three feet of her when she had her senses and nothing intervened between her and the witnesses, is good under the statute. It was done both literally and substantially in her presence." But the court, it seems to us, clearly showed a ³²⁰ mistrust of that position, as is shown by the following language: "There are authorities going to the extent of holding that the transaction being openly done, there can be no question of presence where the parties are all in the same room": *Best on Presumptions*, 83. But however this may be, it is clear upon authority, if it be affirmatively established that the testator might have seen, the attestation is good: *Powell on Devices*, 96; *Tod v. Earl of Winchelsea*, 12 Eng. Com. L. 227. And, too, in *Cornelius v. Cornelius*, 52 N. C. 593, the doctrine laid down in *Jones v. Tuck*, 48 N. C. 202, was not questioned, for the court said there: "We are not disturbing at all the case of *Jones v. Tuck*, 48 N. C. 202, to which our attention has been called. In that case it appeared that the testator could not have turned himself so as to have seen the attesting witnesses subscribe without danger, and acting contrary to the advice of the physician. In the case before us the turning of the head would have sufficed to enable the testator to see, and that according to the testimony he could do without pain or difficulty."

Upon a review of these cases, we are of the opinion that there was no error in the instruction of his honor which we have been considering, and that the principle announced in *Graham v. Graham*, 32 N. C. 219, is the correct one. The decedent must be in such a situation—such a position—as will enable him, if he will look, to see the paper writing which he has signed as it is being subscribed by the witnesses; he must have the opportunity through the evidence of ocular observation to see the attestation of the paper from the position or situation in which

he is, if he will look, and this so as to exclude the almost impossibility of a substitution of the paper which he has signed with another by some other person.

In the case before us, it does not appear whether the decedent was able to turn his head to one side or not. Two of the ³²¹ witnesses said that if he had turned his head to one side he could have seen the paper. If he could have done so without risk or danger, or not contrary to his physician's advice, and was of testamentary capacity (and there is no proof before us to the contrary), then there was a compliance with the statute in reference to the attestation: *Cornelius v. Cornelius*, 52 N. C. 593. But even if he was of testamentary capacity, and there was no fraud or undue influence, yet if he was unable to partly turn his head so that he might look and see the paper writing as it was being subscribed, the attestation was not according to the requirements of the statute.

The court further instructed the jury "that the deceased must have actually requested the witnesses to sign the paper writing as witnesses, and if the jury should believe from the evidence that he did not so request them or either of them, then the paper writing was not properly executed as a will, and they should answer said issue, 'No.'" We think the instruction was given in language too broad, and that it was, therefore, erroneous. There is nothing in the statute (Code, sec. 2136) which requires that the decedent shall ask or request the witnesses to subscribe, and we can see no reason why the draughtsman of the will, or any other person, in the presence of the testator and with his acquiescence and approval and with a clear knowledge of what was going on, should not make the request of the witnesses to sign the script. Nor can we see any good reason why the request should not be implied from the testator's conduct or well-understood signs. Such implied requests have been frequently held by the courts to be sufficient: 29 Am. & Eng. Ency. of Law, 205, and cases there cited. In New York the statute requires that the witnesses must sign at the request of the testator, but it was held in *Gilbert v. Knox*, 52 N. Y. 125, that the words of request or acknowledgment may proceed from another, and ³²² will be regarded as those of the testator where the circumstances show that he adopted them, and that the party using them in his presence was acting for him with his assent. In *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220, the draughtsman of the will, in the presence of the testator, requested the witnesses to witness the will, and they thereupon

signed it, and it was held to have been done at the request of the testator. There was error in the instruction of his honor which we have last discussed.

FURCHES, J., concurring in the judgment of the court but not in the conclusion arrived at, in discussing the first proposition: As the case goes back for a new trial, he will not enter into a discussion of that question now, further than to say that the opinions in *Bynum v. Bynum*, 33 N. C. 632, and *Cornelius v. Cornelius*, 52 N. C. 593, carry the doctrine of "being signed in the presence of the testator" as far as he is willing to go.

Something must be left to personal confidence. Were this not so, neither a blind man nor an illiterate man could make a will. Though an illiterate man may see the witnesses sign the paper he has signed with a cross mark, yet he only knows it is his will because he has confidence in the party who wrote it and read it to him.

Faircloth, C. J., concurred in Justice Furches' view.

WILLS—ATTESTATION IN TESTATOR'S PRESENCE.—A will may be regarded as attested in the presence of the testator, though the attestation did not take place in the room where he then was, and was not actually seen by him, if it took place within the range of his vision and might have been so seen, considering his position and state of health at the time. The true test is, not whether the testator saw the witnesses sign, but whether, considering his mental condition and his posture at the time, he might have seen them do so: *Witt v. Gardiner*, 158 Ill. 176, 49 Am. St. Rep. 150, and note. On this subject in general, see the extended notes to *Will of Meurer*, 28 Am. Rep. 595-598; *Maynard v. Vinton*, 60 Am. Rep. 285, 286; *Guthrie v. Owen*, 36 Am. Dec. 320, 321.

WILLS—WITNESSES—REQUEST TO SIGN.—No specific request by the testator to the witnesses to sign is necessary. A request by another than the testator, but in the latter's presence, that the witnesses sign, he making no objection when they do sign, is held sufficient: Extended note to *Coffin v. Coffin*, 80 Am. Dec. 242.

WEIL v. CASEY.

[125 NORTH CAROLINA, 356.]

JUDGMENTS — LIEN OF — MORTGAGE — PURCHASE MONEY.—A judgment debtor may purchase land and at the time that he receives his conveyance may give, to secure any portion of the purchase price, a mortgage, which takes precedence over the judgment as a lien on the land purchased.

JUDGMENTS — LIEN OF — MORTGAGE FOR OTHER THAN PURCHASE MONEY.—If, upon acquiring land, the judgment debtor immediately executes a mortgage, not for the purchase money, the lien of such mortgage is subordinate to that of the judgment.

JUDGMENTS—LIEN OF—MORTGAGE FOR PURCHASE MONEY AND OTHER DEBTS.—If a judgment debtor, immediately upon acquiring land, executes a mortgage to secure the purchase money and also an antecedent debt, the judgment must be postponed to such purchase money, but is superior to such prior debt.

H. B. Parker, for the appellants.

I. F. Dortch and Allen & Dortch, for the appellee.

357 MONTGOMERY, J. This action was originally brought by H. Weil & Brothers, and Junius Slocumb, trustee, against Samuel C. Casey and Sarah J., his wife. No pleadings were filed, but the record states that the plaintiffs Weil & Brothers, by their attorney, filed a duly verified complaint in foreclosure of mortgage proceedings, and that no answer was filed, and judgment of foreclosure was obtained. The judgment is set out, and in the same the amount of the debt of the plaintiffs is declared, and the several tracts of land said to be mentioned in the complaint are condemned to be sold to satisfy the judgment. Before the sale was made, A. T. Grady and A. H. Morris, judgment creditors of the defendant Samuel ³⁵⁸ Casey, were made parties plaintiff. The case was heard upon an admitted state of facts, as follows:

1. On the date of the docketing of the judgments of Grady and Morris, Casey owned two tracts of land, one called or known as the "Creek tract," containing two hundred and fifty-six acres, and another known as the "Home tract," containing three hundred and fifty acres.

2. That the plaintiffs Weil & Brothers, held a mortgage on these two tracts of land, duly registered prior to the judgments, to secure a debt of two thousand one hundred and twenty-six dollars and ninety cents.

3. That afterward Casey bought by deed from Thomas B. Raynor another tract of land called the "Raynor tract," containing two hundred acres, and that on the same day Casey and wife executed to Weil & Brothers a mortgage on the Raynor tract to secure the payment of a note of fifty dollars, for money advanced by Weil & Brothers, to Casey, with which Casey paid to Raynor a part of the purchase money, and also to better secure the old debt of two thousand one hundred and twenty-six dollars and ninety cents. The judgment of foreclosure directed the sale of the three tracts of land for the purpose of paying the debt of two thousand one hundred and twenty-six dollars and ninety cents and interest, and also the fifty dollar note.

5. In 1898 the homestead of Casey was duly laid off to him in the "Home tract" of three hundred and fifty acres, and no objection has ever been made to the homestead allotment.

6. Casey and wife have no other property subject to the payment of the judgments than the Raynor tract of two hundred acres.

7. That the commissioner appointed by the court sold all three of the tracts, the Raynor tract of two hundred acres bringing three hundred and forty dollars, and the total sum of the three tracts not bringing enough to pay the debt of Weil & Brothers.

8. The deed from Raynor and wife to Casey, and the mortgage from Casey and wife to Weil & Brothers upon the Raynor land, were executed at one and the same time, and in consequence ³⁵⁹ of an agreement that both the deed and the mortgage should be executed at the same time, and to secure the fifty dollars advanced, and also for the further security for the note of two thousand one hundred and twenty-six dollars and ninety cents.

Upon those facts the plaintiffs Grady and Morris insist that after the application of fifty dollars and interest, to be paid to Weil & Brothers on account of the amount advanced by them to Casey as a part of the purchase money of the Raynor land, enough of the balance of the three hundred and forty dollars, for which the Raynor tract was sold by the commissioner, should be applied to their judgment and costs. His honor, being of opinion that the judgment creditors were not entitled to the relief they sought, dismissed their petition.

The question for decision then is, Does a mortgage, executed simultaneously with the delivery of the deed from the grantor

to the mortgagor for another consideration than the purchase money of the land conveyed and to a person other than the grantor, with the understanding between the mortgagor and that other person at the time of the execution of the deed by the grantor that the mortgage should be so made, hold good against the then existing judgments against the mortgagor? The plaintiffs' counsel in their brief insisted that, as the deed from Raynor to Casey and the mortgage by Casey to Weil & Brothers were executed at the same time, and that as the fifty dollars purchase money for the land was paid by the plaintiffs in consequence of an agreement and understanding that the mortgage should be executed to secure both the fifty dollars and the antecedent debt, the whole was a concurrent transaction, i. e., one transaction, and that, although the title vested, it did not vest in him and that the judgment liens did not, therefore, attach to the land. In support of that view the cases of *Bunting v. Jones*, 78 N. C. 242, and *Moring v. Dickerson*, 85 N. C. 466, were cited. In both of these cases, ³⁶⁰ the consideration for the mortgage was the purchase money of the land, and when the court in these cases referred to the deed and the mortgage as being one transaction, and that the two instruments should be treated as one because they were simultaneously executed, the court had reference only to cases where the mortgage was for the purchase money of the land. In all the cases cited the consideration of the mortgage was the purchase money of the land, and it was in *Moring v. Dickerson*, 85 N. C. 466, stated in substance that all of the cited cases proceeded upon the view that the seisin of the grantee was but for the instant, and that it was never intended to be in him beneficially at all, but that the real purpose was to convey the title to the mortgagee as a security for the money advanced. The reason why the title did not vest in the purchaser of the land is that the purchase money had been advanced by the mortgagee, and when the court said that because the deed and mortgage are executed simultaneously, they are concurrent transactions, i. e., one transaction, it was only to say that if there had been an interval between the delivery of the deed and the execution of the mortgage, then the judgment liens would have attached, for a title would have vested in the grantee because of the interval. This learning may be found in *Freeman on Judgments*, section 373, which says: "No doubt one against whom a judgment has already been docketed may purchase land, and at the same time he receives his conveyance

may give, to secure any portion of the purchase money, a mortgage which will take precedence over the judgment as a lien on the land purchased. . . . The reason assigned for this is, that the conveyance and the encumbrance being simultaneous, no opportunity is given for the judgment lien to attach. But it has also been decided that if, upon acquiring land, the judgment debtor immediately executes a mortgage, not for the ³⁶¹ purchase money, the lien of the mortgage will be subordinate to that of the judgment."

The plaintiffs Weil & Brothers, moreover, contend that, if the judgment creditors Grady and Morris had been entitled to the relief demanded, the homestead right of the defendant Casey would intervene to prevent the application of any part of the proceeds of the sale to the creditors until the homestead had fallen in. We hardly understand this contention, because Casey and his wife were before the court, and the order of sale of the land, including the homestead, was made without exception or protest on their part. But, if there had been exception, we do not see how it could have availed, for in *Gulley v. Thurston*, 112 N. C. 192, it was decided that the lien of a judgment was superior to that of a subsequently registered mortgage made on property outside of the debtor's allotted homestead. The homestead in the present case had been duly allotted to the defendant Casey, and no objection had been made to the allotment.

There was error in the judgment of the court below in dismissing the petition of the judgment creditors Grady and Morris. They were entitled to have the amount, principal, interest, and costs due upon their judgments satisfied out of the proceeds of the sale of the Raynor land in the commissioner's hands. The rest of the judgment is affirmed.

MORTGAGE FOR PURCHASE MONEY—PRIORITY OVER JUDGMENT.—A purchase money mortgage executed contemporaneously with a deed of purchase, whether to the vendor or to a third person who advanced the purchase money, takes precedence over the lien of a prior judgment against the mortgagor: *Stewart v. Smith*, 36 Minn. 82, 1 Am. St. Rep. 651; *Laidley v. Aikin*, 80 Iowa, 112, 20 Am. St. Rep. 408, and note. See, too, *Rees v. Ludington*, 13 Wis. 276, 80 Am. Dec. 741.

A JUDGMENT LIEN IS PARAMOUNT to a junior mortgage lien: *Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 333. See, also, *Ocobock v. Baker*, 52 Neb. 447, 66 Am. St. Rep. 519.

HOLT v. COUCH.

[125 NORTH CAROLINA, 456.]

APPEAL.—FACTS FOUND BY A REFEREE, based upon competent evidence and confirmed by the trial court, cannot be reviewed on appeal.

COTENANCY—BETTERMENTS.—The term "betterments" has no application to cotenants, but is for the protection of a purchaser of land, who makes lasting improvements under the belief that he has a good title.

COTENANCY — PARTITION — IMPROVEMENTS.—Equity is effected between cotenants on partition either by assigning the improved part of the property to him who made it, at its value before the improvements were made, or, if that cannot be done, then by a reasonable allowance to the one who has enhanced the value of the property.

COTENANCY—PARTITION—BENEFITS AND LOSSES.—If on partition, a cotenant claims an equality of benefits, he must submit to an equality of burdens, and, if a loss results in good faith from an error of judgment on the part of the tenant in charge of the property, such loss must fall upon all of the cotenants equally. If loss is caused by the positive wrong of such cotenant, he alone must bear the loss.

COTENANCY — PARTITION—IMPROVEMENTS.—If property held in cotenancy is not susceptible of being divided, the court may order an account before partition, and provide for a suitable compensation for improvements to the tenant making them.

Douglass & Simms, for the appellants.

Black & Adams and W. E. Murchison, for the appellee.

457 FAIRCLOTH, C. J. Prior to February, 1891, C. E. Holt and the defendant were tenants in common of the property described in the complaint, situated at Southern Pines, in Moore county, each owning one-half interest therein. The said owners erected on the lot a building, the lower front part for a store, and the upper story was partially constructed for a boarding-house. C. E. Holt died on February 17, 1891, and the plaintiffs became the owners of his interest in said property, they being nonresidents of the state. After Holt's death the defendant remained in the sole possession and management of the property, and finding the building unattractive and not profitable as a store and boarding-house, he made changes, additions, and improvements, and thus converted the building into a more modern hotel, called the "Ozone Hotel." He paid all expenses, insurance, taxes, and repairs, and collected the rents and profits. It does not appear that the plaintiffs took any active part in the management of the property.

On April 30, 1895, the plaintiffs instituted an action against the defendant for one-half of the rents since the death of C. E. Holt, alleging the annual rental value to be five hundred dollars.

On November 30, 1895, the plaintiffs filed their petition in the proper court to sell said property for partition. Subsequently, these two actions were by agreement consolidated. An order of sale was made, without prejudice to the rights of either party as to improvements or rents put upon or arising out of said real estate.

At August term, 1898, the case was referred, to take an ⁴⁵⁸ account and pass upon the law and facts, and report, etc. The referee reported on the pleadings and the evidence the following facts:

"3. That the value of the improvements put upon the property by R. M. Couch, since the death of C. E. Holt, is nine hundred and thirty-eight dollars.

"4. That the said improvements were reasonable, necessary, and advantageous to the property, and were neither authorized nor objected to by the plaintiffs.

"5. That the amount of insurance and taxes paid on said property by the defendant since the death of C. E. Holt is nine hundred and seventy-one dollars.

"6. That the average rental value of the premises since the death of said C. E. Holt is two hundred dollars per year."

He, then, as matter of law, concludes that the defendant be charged with one-half the rental value, to wit, eight hundred and fifty dollars and credited with one-half of the value of the improvements, to wit, four hundred and sixty-nine dollars, and with one-half of the amount expended in paying taxes and insurance on the property, to wit four hundred and eighty-five dollars and fifty cents, and that there is a balance of one hundred and four dollars and fifty cents due the defendant by the plaintiffs on said account.

This report was confirmed by the court, and judgment entered accordingly, from which the plaintiffs appealed.

The plaintiffs except to each item of the account and to the findings of fact and legal conclusions of the referee. When the facts are found by the referee, if based upon competent evidence, although conflicting, as we find to be the case in this instance, such findings are not reviewable by this court. Taking, then, the facts as reported, his legal conclusions are correct. The plaintiffs, by their exceptions, do not pointedly pre-

sent the legal propositions relied on by their counsel in his argument, but we consider them according to his contention. They are: ⁴⁵⁹ 1. That a cotenant, except by consent, has no right to make improvements by additions, change in the structure, etc., as distinguished from repairs, etc., for preservation of the property; 2. That in no event, except by consent, can a cotenant in sole possession expend more than the rents and income of the property, and charge his cotenants therewith, because that would put it in his power by recklessness to impair the value or indirectly dispose of the value of his cotenants' interest, presumably for his own benefit.

To avoid confusion, we may here state that the code, chapter 10, page 182, on close examination, has no application to tenants in common. That provision is for the protection of a purchaser of land who makes lasting improvements under the belief that he had a good title. After judgment is entered against him for the land, he may, as herein provided, have an allowance for the improvements, usually called "betterments."

As we decide to affirm the judgment, we will examine the plaintiff's authorities to support his proposition. They rely on *Norton v. Sledge*, 29 Ala. 478, 498. This was a bill for partition. *Sledge* and *George H. Horton* were tenants in common, and *George Horton* was trustee of the interest of his son *George H.* The trustee expended on the property more than the rents and income, and the excess was not allowed him when the partition was closed. The court remarked: "George Horton can in no event be entitled to compensation for improvements made beyond the rents charged against him," for the reason that "in the partition, *George Horton* (trustee) has no direct and immediate interest, but he has an indirect interest." This does not apply, owing to a different state of facts, the trustee claiming compensation out of the property in which he had no interest.

In *Field v. Leiter*, 117 Ill. 341, the court held that, ⁴⁶⁰ "one tenant in common may rightfully insist that the other shall contribute his proportional share for the preservation of the joint property, but he cannot insist that he shall enter upon new investments to be paid for from the joint property or out of other funds belonging to him against his judgment and inclination." This case will not fit, as the expenditures in the case we have were not made against the "judgment and inclination" of the plaintiffs.

Elrod v. Keller, 89 Ind. 382: "Where improvements thus made affect the entire property, compensation will not be made upon partition, unless the improvements were necessary or useful to the enjoyment of the estate, . . . or were made under such circumstances as create an equitable claim." This seems to be an authority in favor of the defendant, as the referee finds that the improvements "were reasonable, necessary, and advantageous to the property."

Taylor v. Baldwin, 10 Barb. 582 (in 1850): "It does not appear well settled in this country . . . that one tenant in common, without any contract, can make necessary repairs upon the property and charge his cotenant in an action for the amount." There is no question of that kind here before us.

Israel v. Israel, 30 Md. 120, 96 Am. Dec. 571: "A tenant in common, occupying the common property, will not be allowed for expenses which were incurred not for the preservation of the property, but rather to gratify his taste and contribute to his convenience." We probably would agree to that proposition upon the same state of facts. It was, however, an action for "use and occupation." There seems to be no ground to doubt that the common property is liable for its taxes, and the tenant who pays them "will have a lien upon the common property to secure such reimbursement": 11 Am. & Eng. Ency. of Law, 1109.

⁴⁶¹ The plaintiffs except to the insurance item in the defendant's account. It is not distinctly stated whether the insurance was taken for the whole property or for the defendant's interest in it. The only evidence is this: "Question: Mr. Couch, why was it you insured that building alone for three thousand dollars, when you stated that it was not worth any rent at all? Answer: It was what money I had put in it, in case it was burned. Question: So you were going to collect from the insurance company even if it was not worth anything? Answer: The insurance company did not consider the rents. I left it with the agent."

The inference is that the insurance covered the whole property unless there was contrary evidence. No point was made about it in the evidence, and it was upon the plaintiff to rebut the reasonable inference, if it was not correct.

The object of a court of equity is to arrive at a just conclusion in every case, and among tenants in common it may be done either by assigning the improved part of the property to him who makes it, at its value before the improvement is made, or, if that cannot be done, then by a reasonable allow-

ance to the one who has enhanced the value of the property. This is well expressed in 1 Story's Equity Jurisprudence, section 656b: "In suits in equity also for partition, various other equitable rights and claims and adjustments will be made, which are beyond the reach of courts of law. Thus, if improvements have been made by one tenant in common, a suitable compensation will be made him upon the partition or the property on which the improvements have been made assigned to him. So courts of equity will not only take care that the parties have an equal share and just compensation, but they will assign to the parties respectively such parts of the estate as would best accommodate them and be of most value ⁴⁶² to them, with reference to their respective situations in relation to the property before the partition. For, in all cases of partition, a court of equity does not act merely in a ministerial character, and in obedience to the call of the parties who have a right to the partition, but it founds itself upon its general jurisdiction as a court of equity, and administers its relief *ex aequo et bono* according to its own notions of general justice and equity between the parties." This court has made similar rulings in *Pope v. Whitehead*, 68 N. C. 191, and in *Collett v. Henderson*, 80 N. C. 337.

It is a general rule that where a cotenant claims an equality of benefit, he must submit to an equality of burden, and if the loss results from error in judgment or carelessness of the one in charge of the property, it will still fall upon both equally. If, however, the loss is caused by positive wrong or a nuisance, then the wrongdoer must alone bear the loss. In all such instances, good faith is always required: 11 Am. & Eng. Ency. of Law, 1107. If the property is not susceptible of being divided, then the court will order an account before partition is made, and provide for a suitable compensation for the improvements: 17 Am. & Eng. Ency. of Law, 758n; *Reed v. Reed*, 68 Me. 568. Other authorities are accessible, but these are deemed sufficient.

Turning, then, to the case at bar, we discover from a review of the record that the common property was of small value at the time the improvements commenced; that the defendant in the exercise of his honest judgment conceived the purpose of making a change in the building suited to local conditions, and that the plaintiffs gave no attention to their property for several years, and tacitly allowed the defendant to manage it as he deemed best, and finally demanded by action full rents

for the improved condition of the property, and no suggestion of bad faith or positive wrongful conduct on the part of the ⁴⁶³ defendant is made. It appears, in a general way, that disappointment and loss took place by reason of fluctuations in values at Southern Pines, as a health and pleasure resort. It does not appear that the defendant has abused the confidence of his cotenants or his position in relation to the property. He bears half of the depreciation in the value of the property, and the account stated by the referee shows only a small difference in his favor.

Upon the foregoing view of the case we see no error in the record.

Affirmed.

DOUGLAS, J., concurring in result. While concurring in the judgment of the court, I must dissent from its opinion, if it intends to hold that a tenant in common can, without the consent of his cotenants, put substantial improvements upon the common property, and thus obtain a lien thereon for the value of his improvements. This would permit him in its logical result to improve his co-owners entirely out of their own property. If this be the rule sought to be established, in my opinion, it would not only be contrary to the current of authority, but capable of very great abuse. A cotenant has no right to control the property of others contrary to their will. If he wishes to improve the common property, he can very easily communicate with the other owners. If they consented, they would be equally bound, and perhaps, if they did not object, they might be held to have acquiesced. It would impose no hardship upon him to require him to drop them a postal card, while it would impose very great hardship upon them to permit him to encumber the common property at his own pleasure without the consent or even knowledge of the co-owners. Such a ruling was not necessary to the decision of this case. The defendant is entitled to reimbursement for ⁴⁶⁴ taxes, and perhaps for insurance, either of which would be greater than the small balance of rents left after deducting the value of his improvements. In this way, the judgment can be sustained, and full justice done to the defendant without overturning or ignoring any of the well-established principles of equity. I therefore concur in the judgment of the court, but respectfully dissent from its opinion as written.

PARTITION—IMPROVEMENTS.—A COTENANT who believes himself to be the owner of the entire premises, and in good faith places improvements thereon, is entitled, on partition, to be allotted that portion upon which the improvements are placed. If such a division cannot be had, the property should be sold and the value of the improvements awarded him out of the proceeds: *Leake v. Hayes*, 13 Wash. 213, 52 Am. St. Rep. 34.

PARTITION—IMPROVEMENTS.—When partition is made, a part improved should be allotted to the one who made the improvements, estimating its value without the improvements; but if this cannot be done, the one to whom the improved part is allotted need not pay for the improvements. If partition must be made by sale, a cotenant who has made improvements cannot be awarded the cost thereof, but should be given the actual enhancement of value therefrom existing at the time of the sale: *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911, and monographic note, 938, 939. See, also, *Ballou v. Ballou*, 94 Va. 350, 64 Am. St. Rep. 733; *Cosgriff v. Foss*, 152 N. Y. 104, 57 Am. St. Rep. 500.

WHITE v. FOX.

[125 NORTH CAROLINA, 544.]

TRESPASS—SALE OF GROWING TIMBER.—If one in adverse possession of land sells the timber growing thereon, which is cut and removed, and takes the purchaser's note for the price thereof, but is afterward ejected by the true owner, the latter cannot maintain an action to recover possession of such note, nor to recover the price of such timber. His remedy is an action in trespass for the damages done to his land by such person while in possession.

Armfield & Turner and W. C. Newland, for the appellants.

T. M. Hufham, A. L. McIntosh, and J. L. Gwaltney, for the appellees.

545 **MONTGOMERY, J.** After the evidence was all in and the argument of counsel concluded, his honor intimated the opinion that, upon the complaint, it appeared that the action was for the note mentioned in the complaint, and not for damages to the freehold, and that the plaintiffs could not recover. The plaintiffs insisted, however, that the case should go to the jury, which being done, the court instructed the jury to find in answer to the first issue that the land was the property of the plaintiffs; in answer to the second issue, that Granville Fox and E. W. Rowe caused to be cut and severed from the land the timber grown thereon, and in answer to the fourth issue, that the plaintiffs were not the owners of, and entitled to, the

possession of the note in controversy. The first and second allegations of the complaint contain statements of the death of Rowe, and the appointment of the defendant Wise as his administrator, and of the plaintiffs' ownership of the lands; and the balance of the complaint is as follows: "3. That during the fall and winter of 1894-95 the testator, E. W. Rowe, being in possession of the plaintiffs' land above described, unlawfully and without right undertook to cut and remove, and did cause to be cut and removed by the defendant Granville Fox, all the marketable timber then growing and standing upon the plaintiffs' land, so that said land was stripped of its timber and rendered almost valueless. That, as the plaintiffs are informed and believe, the defendant Granville Fox and said E. W. Rowe made and entered into contract, whereby the said Granville Fox agreed to pay said Rowe the sum of two hundred and twelve dollars, and gave his promissory note to said Rowe for said sum. That plaintiffs are informed and believe, and so allege, that the sole consideration of the note aforesaid was the timber belonging to plaintiffs which was unlawfully sold to him by said E. W. Rowe. ⁵⁴⁶ 4. The plaintiffs further allege, upon information and belief that the testator of defendant Wise in his lifetime pledged the said note to Jerry Fox as collateral security, or to indemnify him against loss as bondsman on a defense bond in an action wherein the parties to this action sought to recover said lands, and in which they recovered the same, and that said note is now in the hands of said Jerry Fox. That said Jerry Fox took said note with full notice of the fact that it was given for plaintiffs' timber, and with full notice of plaintiffs' rights. 5. That the plaintiffs immediately after the termination of the action wherein they were declared to be the owners of said land, and wherein the possession of said E. W. Rowe was declared to be wrongful, gave notice to the maker of said note not to pay the same to anyone, and to said Jerry Fox not to collect the same."

After a careful reading and consideration of the complaint, we are of the opinion that his honor's conclusion as to the nature of the action and his instructions to the jury were correct.

If the action had been for damages to the freehold, it was necessary that the injury should have been alleged to have been committed by Rowe, who was in adverse possession of the land, and who sold the timber therefrom to Granville Fox. But

that is nowhere intimated in the complaint, in so far as a specific charge to that effect is made against Rowe as a foundation for the action, and nowhere in the complaint is there an allegation of the amount in dollars and cents in which the land has been damaged. It is nowhere stated in the complaint that the amount of damage to the land was equal to, or more or less than, the amount of the note. On the other hand, the complaint does show distinctly that the note was the specific thing sued for; and while the prayers ⁵⁴⁷ for relief at the end of the complaint cannot affect the cause of action set out in the complaint by confining the plaintiffs to the relief prayed for, yet, in this case, it is significant that all the prayers for relief are concerning the possession of this note and the collection of it for the benefit of the plaintiffs, while there is no demand for damages for injury to the land. This case does not fall under the principle of equity announced by the court in the case of *Ijames v. Gaither*, 93 N. C. 358.

The plaintiffs, in their complaint, seek no such relief, and there is not a word in reference to the principle in *Ijames v. Gaither*, 93 N. C. 358, in the brief of the appellants' (plaintiffs') counsel. Every contention of the plaintiffs is purely legal and for the possession of the note, and an insistence that upon the face of the complaint there is a sufficient allegation for damages. If, in the former suit of the plaintiffs against Rowe for the possession of the land, in which the plaintiffs recovered judgment for the possession of the land and for their costs, the defendant Rowe and Jerry Fox, the surety on Rowe's bond for costs, had been insolvent and unable to respond to the payment of the costs, then, in equity, the note which Rowe had put into the hands of Jerry Fox to indemnify him against loss, if any he should sustain, by reason of his having signed Rowe's bond for the costs, could have been reached by the plaintiffs for their benefit to the extent of plaintiffs' costs, under the principle enunciated in *Ijames v. Gaither*, 93 N. C. 358. The note was put in the hands of Jerry Fox, not to indemnify him against loss on account of any alleged connection of Jerry Fox with the alleged injury to the land, for he had no connection with it, but simply to indemnify him against loss by reason of his having signed defendants' bond for costs and damages in the land suit, under section 237 of the code.

⁵⁴⁸ Was his honor's ruling, then, that the note could not be recovered, correct? We are of the opinion that it was. Rowe was in adverse possession of the land from which the timber

had been cut and severed. He sold the timber to Granville Fox and took notes therefor with Jerry Fox as security, one of which notes is the one in controversy. The plaintiffs could not have recovered the timber after it was severed from the land, for, if they could, then it would follow that they could recover the value of the same from any person to whom it might have been sold; and such a rule would make every purchaser from a person in possession, and claiming the land as his own, a guarantor of that person's title. Such a rule cannot be the law. In *Brothers v. Hurdle*, 32 N. C. 490, 51 Am. Dec. 400, the defendant had been the plaintiff in a suit for the possession of a tract of land, and when put in possession found thereon growing crops, and crops gathered and stored in the cribs; he took possession of both. In a suit in trover by the defendant in the action in ejectment for the gathered crops, the jury found, under the instruction of the court, that the plaintiffs should recover the value of the severed crops. The instruction was sustained by this court. In the opinion in that case the court said: "If the defendant had a right to take the specific articles, he would for the same reason be entitled to recover their value in trover against the plaintiff or anyone to whom he might have sold them. The amount of which would be where one who has been evicted regains possession, he may maintain trover against everyone who has bought a bushel of corn or a load of wood from the trespasser at any time while he was in possession. . . . There is no authority for it in our reports, the invariable practice having been to bring trespass for mesne profits and for damages if there has been any destruction to the freehold." And the court further said in the same opinion, after ⁵⁴⁹ drawing the distinction between the wrongful act of a tenant in cutting and severing trees or disposing of crops, or one having a particular estate, and one in possession of land claiming the property as his own: "But where one who is in the adverse possession gathers a crop in the course of husbandry, or severs a tree or other thing from the land, the thing severed becomes a chattel, but it does not become the property of the owner of the land, for his title is divested—he is out of possession, and has no right to the immediate possession of the thing, nor can he bring any action till he gains possession. Then, by the *jus postliminii* or fiction of relations, he is considered as having been in possession for the purpose of bringing trespass *quare clausum fregit* with a *continuendo* from day to day, in which he recov-

ers the value of the mesne profits and damages for the injury done to his freehold by the severance of any part of it, or for any other injury consequent to the breach of his close."

The same principle is applied in the cases of *Ray v. Gardner*, 82 N. C. 454, *Faulcon v. Johnston*, 102 N. C. 264, 11 Am. St. Rep. 737, and *Howland v. Forlaw*, 108 N. C. 567. If the timber, then, could not have been recovered by the plaintiffs, nor a purchaser of the same have been made to account for its value, certainly the note for which the timber was given cannot be recovered; the principle is the same.

There was no error.

REMOVING TIMBER BY ONE IN ADVERSE POSSESSION—REMEDY OF OWNER.—Replevin does not lie for trees cut on land when the defendant was in possession under claim of title: *Snyder v. Vaux*, 2 Rawle, 423, 21 Am. Dec. 466; nor assumpsit for the value of the trees severed: *Downs v. Finnegan*, 58 Minn. 113, 49 Am. St. Rep. 488. But trover may be maintained: *Wilson v. Hoffman*, 93 Mich. 72, 32 Am. St. Rep. 485; or trespass de bonis asportatis: *Alliance Trust Co. v. Nettleton Hardware Co.*, 74 Miss. 585, 60 Am. St. Rep. 531; or trespass quare clausum fregit: *Brothers v. Hurdle*, 10 Ired. 490, 51 Am. Dec. 400. See, also, *White v. Yawkey*, 108 Ala. 270, 54 Am. St. Rep. 159; *Mather v. Trinity Church*, 3 Serg. & R. 509, 8 Am. Dec. 663; *Brown v. Caldwell*, 10 Serg. & R. 114, 13 Am. Dec. 660, and note; and especially *Alliance Trust Co. v. Nettleton Hardware Co.*, 74 Miss. 585, 60 Am. St. Rep. 533.

BARKER v. SOUTHERN RAILWAY COMPANY.

[125 NORTH CAROLINA, 596.]

DEEDS—ESSENTIALS.—A deed, to be valid on its face, requires not only a grantor and a grantee, but also a thing granted, and, if the description is too indefinite to convey anything, then the paper on its face lacks one of the essential elements of a conveyance. A deed cannot be color of title to land in general, but must attach to some particular tract.

DEEDS—DEFECTIVE DESCRIPTION—ACTS OF GRANTOR TO AID.—If the description in a deed is too vague to be located by extrinsic evidence, it may, in fact, be located by the grantor himself, and he may be estopped from denying his acts, if, at the time of the conveyance he has the land surveyed and places the grantee in actual possession, under designated lines and marked corners.

G. F. Bason and A. B. Andrews, Jr., for the appellant.

Smith & Valentine, for the appellee.

⁵⁹⁷ DOUGLAS, J. This is an action in the nature of ejectment. On April 1, 1879, the plaintiff executed to the Spartan-

burg & Asheville Railroad Company, whose title the defendant now owns, a deed with the following description: "Adjoining the lands of T. G. Barker [the plaintiff], beginning at a stake on the east side of the railroad track and on said track, and runs east 20 south 270 feet to a stake; thence north 2 west 240 feet to a stake; thence west 20 north 270 feet to a stake in the railroad track; thence south 2 east with the railroad track 240 feet to the beginning, containing $1\frac{1}{2}$ acres . . . for its use as a stockyard, and other railroad purposes."

The defendant introduced testimony tending to prove that at the time of the execution of said deed the plaintiff had a surveyor to run out and locate the lot in controversy, and put the Spartanburg & Asheville Railroad Company in actual possession thereof; that the said company built a fence around said lot, the line of which fence can still be seen; and that the said company and its successor in title, the defendant, have remained in actual and continuous possession of said lot to ⁵⁹⁸the present time. The plaintiff now seeks to recover said lot, on the ground that the descriptive words in the deed are insufficient to convey title as being too vague and indefinite to admit of location.

This contention of the plaintiff as to the insufficiency of the description appears to be correct. There is not a single corner fixed by anything more definite than a stake, which as far back as *Massey v. Belisle*, 27 N. C. 170, 178, was held insufficient as designating "imaginary points." It is true the stake is said to be on the east line of the railroad, but that is extremely indefinite, as the railroad is of great length. The lot in question is again said to adjoin the lands of the plaintiff, which we presume means simply the land from which it was cut off, but on which side it adjoins does not appear. In other words, from the description in the deed the lot attempted to be conveyed might be shifted up and down the railroad for an indefinite distance. We therefore think the description is not sufficient: *Massey v. Belisle*, 27 N. C. 170, 178; *Mann v. Taylor*, 49 N. C. 272, 69 Am. Dec. 750; *Archibald v. Davis*, 50 N. C. 322; *Hinckey v. Nichols*, 72 N. C. 66. There are a large number of other cases holding insufficiency of description; but the above are cited as directly based upon a description calling for stakes alone.

It is urged in behalf of the defendant that, while the description in the deed is too vague to admit of identification by parol evidence, the deed itself purports to convey something, and

therefore may be color of title. This contention is opposed equally to reason and authority. A deed to be valid on its face requires not only a grantor and a grantee, but a thing granted. If the description is too indefinite to convey anything, then the paper on its face lacks one of the essential elements of a conveyance. A deed cannot be color of title to land in general, but must attach to some particular ⁵⁹⁹ tract. Otherwise we would be brought to the absurd conclusion that a man holding a deed purporting to convey a hundred acres of land by stakes and distances only, might shift his color of title to any part of the county by merely "pulling up stakes" and squatting upon any land he might fancy. This court has repeatedly held that "a deed is color of title only for the land designated and described in it": Davidson v. Arledge, 88 N. C. 326; Smith v. Fite, 92 N. C. 319; King v. Wells, 94 N. C. 344; Dickens v. Barnes, 79 N. C. 490. In this last case, Faircloth, J., speaking for the court says: "If the claim of the party be invalid on its face, or if the deed under which he claims be void, or insufficient in form to pass title, or the description therein be fatally defective, in such cases the possession is not adverse under our statute, because the party acquiring possession must be presumed to know the law and to see that in such cases there is no color of title."

While we have come to the conclusion that the description in itself is too vague to be located by outside evidence, it appears from the testimony that the land was in fact located by the plaintiff himself, who is thus estopped from denying his own act. Having had the lot surveyed, and placed the defendant in actual possession thereof under designated lines and marked corners, he is now bound by his own admission, and cannot be permitted to controvert the legal effect of his own conduct to the prejudice of another, especially after such long acquiescence. There is a clear distinction between cases where the parties themselves have definitely located the land and where it is merely sought to locate it by outside testimony not in the nature of admissions. We think this distinction is recognized inferentially in Massey v. Belisle, 27 N. C. 170, 178, where the court says, on page 177: "The stakes may be real boundaries when so intended by the parties, but it is a settled rule of construction with us that when they are mentioned in a ⁶⁰⁰ deed simply, or with no other description than that of course and distance, they are intended by the parties, and so understood, to designate imaginary points."

If the facts are true as testified upon the trial, we think the plaintiff is clearly estopped from denying his location of the land, and therefore cannot recover. For error in the charge of the court a new trial must be ordered.

New trial.

FAIRCLOTH, C. J., concurring in the result. On April 1, 1879, the plaintiff conveyed by deed a lot of land to the defendant, the Spartanburg & Asheville Railroad Company, in Henderson county, described in these words: "Adjoining the lands of T. G. Barker [the plaintiff], beginning at a stake on the east side of the railroad track and on said track, and runs east 20 south 270 feet to a stake; thence north 2 west 240 feet to a stake; thence west 20 north 270 feet to a stake in the railroad track; thence south 2 east with the railroad track 240 feet to the beginning, containing $1\frac{1}{2}$ acres for its use as a stockyard and other railroad purposes." The plaintiff now sues for the possession of said lot, on the ground that the descriptive words are insufficient to convey title.

It was proved that the defendant entered into immediate possession, with the consent of the plaintiff, and has been in actual possession ever since. The defendant was allowed to prove by parol that the plaintiff, at the time the deed was executed, had a surveyor to run out and locate the land, and that the defendant put a fence on the line established by the surveyor, and that he put the defendant in possession of the lot, known as the "stock lot" in the town of Hendersonville. At the close of the evidence his honor instructed the jury ⁶⁰¹ that, if they believed the evidence, they should answer the issue in favor of the plaintiff. Verdict and judgment for the plaintiff. The defendant appealed.

The extrinsic evidence was competent. It does not contradict the deed, but it is the unwritten part of the agreement and was useful to find out the intention of the grantor and grantee. The court, when it can do so, desires to give effect to the intention of the parties. The descriptive part of the deed is not a blank. It fixes the locality on the east side of the railroad track and on said track. The jury, with these simultaneous acts and declarations of the grantor, would be able to locate the land referred to in the deed. Assuming, however, for the sake of argument, that the deed is defective in its descriptive clause, I still think it is color of title. Color of title, when the language is plain and unambiguous, is a question of

law for the court. Any deed, having a grantor and grantee and containing a description of the land intended to be conveyed, and apt words for its conveyance, is color of title. Color of title is defined to be that which in appearance is title, but which in reality is no title. "Color of title may be defined to be a writing upon its face professing to pass title but which does not do it, either from a want of title in the person making it, or the defective mode of conveyance which is used, and it would seem that it must not be so obviously defective that no man of ordinary capacity could be misled by it": *Tate v. Southard*, 10 N. C. 119, 14 Am. Dec. 578. "To constitute color of title, there must be some written document of title professing to pass the land, which is not so obviously defective that it could not have misled a man of ordinary capacity": *Dobson v. Murphy*, 18 N. C. 586. A deed, then, like the present, regular and complete in all respects, except in the starting point, which would only be detected by the scrutiny of a legal mind, must fall within the above definitions, ⁶⁰² and the bona fide possession of the defendant for a time far beyond the statutory period cannot be defeated by the grantor or anyone claiming under him.

The defense may rest upon another ground. The plaintiff, having by his deed professed to convey the land, and having at the same time surveyed and located the corners and lines, and put the defendant in possession of the premises within those lines, and allowed his possession to remain uninterrupted for a long time, cannot now be allowed to disturb that possession. He is estopped by his own act and deed.

I think there was error below.

DEEDS—IDENTIFYING LAND AFTER ITS CONVEYANCE. When a tract of land intended to be conveyed is not identified in the conveyance, the parties may afterward survey and stake out the land conveyed; and if the grantee then takes possession, this ascertains the grant and gives effect to the deed: *Simpson v. Blaisdell*, 85 Me. 199, 35 Am. St. Rep. 348.

DEEDS—DEFECTIVE DESCRIPTION.—A deed which conveys no particular spot of ground can transfer no title nor bar a prior equity: *Hart v. Hawkins*, 3 Bibb, 502, 6 Am. Dec. 666. See, too, *Mann v. Taylor*, 4 Jones, 272, 69 Am. Dec. 750, and note. For the requisites of a deed, see *Evenson v. Webster*, 3 S. Dak. 382, 44 Am. St. Rep. 802.

ADVERSE POSSESSION—DEFECTIVE DESCRIPTION IN DEED.—To constitute color of title an instrument must define the boundaries of the claim: Note to *Tate v. Southard*, 14 Am. Dec. 584; *Jackson v. Woodruff*, 1 Cow. 276, 13 Am. Dec. 525. Possession under a vague uncertain entry extends only to the limits of the actual occupancy: Extended note to *Taylor v. Buckner*, 12 Am. Dec. 358. On what constitutes color of title, see the monographic note to *Tate v. Southard*, 14 Am. Dec. 580-584.

STATE v. SHARP.

[125 NORTH CAROLINA, 628.]

HIGHWAYS—NOTICE TO WORK ON.—A road overseer may testify that he left a written notice at the defendant's residence, specifying time and place for working on a public highway, without producing such notice, when the statute requires the notice, and not a copy of it, to be left with the defendant.

HIGHWAYS.—LEGISLATION IN REGARD TO HIGHWAYS is an exercise of the police power and need not be uniform throughout the state, but may be adapted to the wants of the various localities.

HIGHWAYS—STATUTES REQUIRING PERSONS TO WORK ON ROADS—CONSTITUTIONALITY.—A statute requiring persons to work on public roads a certain time without compensation is not a tax, within the meaning of constitutional requirements of prescribed equality between poll and property tax. Such requirement is simply a duty imposed, similar to jury service, and a failure or neglect to perform such duty when requested may be made an indictable offense.

ARREST—WARRANT FOR SUFFICIENCY.—An affidavit upon which a warrant for arrest is based, and the warrant therefor, are in contemplation of law one; and if one is referred to in the other, and if together they constitute a charge of a criminal offense, it is sufficient to resist a motion in arrest of judgment.

Winston & Fuller and Boone, Bryant & Biggs, for the appellant.

Manning & Foushee, C. E. Turner, and Z. B. Walser, attorney general, for the state.

631 CLARK, J. The defendant is indicted for a failure to work the public roads of Durham county, as required by sections 4 and 24, chapter 581, of the Laws of 1899.

The first exception was, that the court permitted the road overseer to testify that he left a written notice at the defendant's residence, specifying time and place for working the roads, without producing the same. This was not error, because the statute requires the notice—not a copy of it—to be left with the defendant. As the overseer could not produce it, he could, therefore, state what it was. It is not the return of process to a court. Besides, the issue is not as to the contents of the notice, which is in the defendant's possession and the contents could be proved for that reason, but the collateral fact that it was served: *State v. Wilkerson*, 98 N. C. 696; *Carden v. McConnell*, 116 N. C. 875; *Archer v. Hooper*, 119 N. C. 581.

The next exception is, that the act requires all the citizens of Durham county to work the public roads, except citizens of

the town of Durham, and the defendant is also an inhabitant of an incorporated town, to wit, North Durham. But that is a matter left to legislative authority, and if it worked any hardship, liable to be changed by any subsequent legislature. This act authorizes some counties to work the roads in the mode therein prescribed, i. e., partly by taxation, and partly by labor, leaving the other counties, generally, to work their roads in the old method by labor alone. And there are still others in which the roads are worked entirely by taxation. Among the counties authorized to work by the mixed ⁶³² system, partly labor and partly by taxation, the general rule laid down in section 4 is to exempt citizens of incorporated towns from labor on the roads, but in section 24, as to Durham county, only the inhabitants of the town of Durham are thus exempt. By section 22 this mixed system is made imperative as to certain counties or townships named. By section 23 its operation in other counties and townships therein specified is made conditional upon the adoption of the provisions of the act by the county commissioners; and still other sections contain modifications of the act as to specified counties and townships, and section 27 specifies counties exempt from the provisions of the act. This legislation was to meet the varying phases of public sentiment in regard to the important matter of working the public roads. A method which would be satisfactory in some counties might, for local reasons, or by reason of a difference in public sentiment, be altogether unadvisable and unacceptable in others. Being altogether a local matter, the legislature has endeavored to meet the views of each locality. If it has made any mistake as to the wishes of any locality, or should there be a change of sentiment in any, any subsequent general assembly can amend the act.

Local legislation of this nature has been very common in North Carolina, and has always been held to be within the powers of the legislature: As to local liquor prohibition acts: *State v. Muse*, 20 N. C. 319; *State v. Joyner*, 81 N. C. 534; *State v. Barringer*, 110 N. C. 525; fence laws: *Cain v. Commissioners*, 86 N. C. 8; *State v. Snow*, 117 N. C. 774; restricting sale of seed cotton in certain counties: *State v. Moore*, 104 N. C. 714, 17 Am. St. Rep. 696; local prohibitions as to cattle running at large: *Broadfoot v. Fayetteville*, 121 N. C. 418, 61 Am. St. Rep. 668; local differences in the methods of electing town and city commissioners: *Harriss v. Wright*, 121 N. C. 172; in the method of electing county commissioners: *Lyon v. Commis-*

sioners, 120 ⁶³³ N. C. 237; local provisions as to public schools: *McCormac v. Commissioners*, 90 N. C. 441; local dispensaries for sale of liquor: *Guy v. Commissioners*, 122 N. C. 471; and, indeed, in this very matter of the method of working public roads: *Tate v. Commissioners*, 122 N. C. 812; *Brown v. Commissioners*, 100 N. C. 92; *Herring v. Dixon*, 122 N. C. 420; and in many other matters: *Intendent v. Sorrell*, 46 N. C. 49, and other cases.

The provision as to Durham county simply divides the county into two road districts, one consisting of Durham town, and the other of the rest of the county, an arrangement which is held valid in *Broadfoot v. Fayetteville*, 121 N. C. 418, 61 Am. St. Rep. 668.

The defendant's counsel strenuously insists that the method of working the public roads by conscription of labor is unjust, in that it falls to the same extent upon the poor man, who has not a wheeled conveyance, and upon him who has many, and that, indeed, if the latter happens to be above the road age, he may use the road by an unlimited number of vehicles, without contributing in the slightest degree to keeping that road in order. It is a matter of common knowledge that the system of working the public roads by conscription of labor is expensive, wasteful, and inefficient. It, perhaps, was suited to a former age, when roads were little used, when labor could be furnished without inconvenience by any able-bodied man, to do the little work required, and money was a scarce commodity. Because of its inefficiency, and possibly from a growing conviction of the essential injustice of the system, and the increasing inequality under present conditions of the burdens laid by working the roads under that system, there has been a steady growth of legislation (beginning with Mecklenburg county, in which so many progressive measures have started) away from the old system, and in the direction of having them worked by taxation. The present stage of public sentiment, ⁶³⁴ varying in different counties, and even townships, is doubtless fairly represented by the varying provisions of the act now before us. It is in the power of future legislatures to extend its provisions at their will, till the roads shall be worked entirely by taxation throughout the state, but that is a matter which rests with the legislative department of the government.

We cannot agree with counsel that requiring the defendant to work the roads is a tax, and, therefore, unconstitutional, because not levied ad valorem in proportion to property. It is not a tax,

at all, within the meaning of the constitutional provision, which requires the prescribed equation between poll and property tax to be observed. It is not a tax, but a duty, like service upon a jury, grand jury, special venire, military service or as witness (*Town of Pleasant v. Kost*, 29 Ill. 490; *Fox v. Rockford*, 38 Ill. 451), which duties formerly were, and, to some extent are still required to be rendered to the state without compensation. With the increased wealth and consequently increased use of roads and need for better roads this duty will become more onerous and unequal, and there will probably be an acceleration in the movement to substitute a taxation upon property in lieu of it. But a duty so long recognized as such, which was universally exacted at the time of the adoption of the present constitution, and which has been recognized ever since, cannot now be deemed and held a tax, and, therefore, unconstitutional. Till 1868 the method of working the roads was left entirely to the legislature to prescribe, and if there had been any intention to restrict the power of the legislature in that regard, or to change the common-law duty of the citizen (1 Blackstone's Commentaries, 358), to work them into a tax, there would have been some express provision to that effect inserted in the new constitution.

There have been numerous decisions of this court since ⁶³⁵1868 sustaining indictments for failure to work the public roads, and necessarily sustaining the constitutionality of such statutes, though the point was not expressly raised, the latest case being *State v. Joyce*, 121 N. C. 610. The defendant moves in arrest of judgment, because the warrant does not describe the offense charged. The affidavit sets out the charge in full, and at the foot the justice of the peace has added his warrant in proper form, but inserting "to answer the above complaint," without reiterating the particulars of the charge. This incorporates the charge in the affidavit into, and makes it a part of, the warrant. This was expressly decided in an exactly similar case for this same offense (*State v. Sykes*, 104 N. C. 694), which has been cited and reiterated as to all offenses, in *State v. Davis*, 111 N. C. 729, *State v. Wilson*, 106 N. C. at page 721, and in other cases. The defendant contends that the prior case of *State v. Bryson*, 84 N. C. 780, is in conflict with these. If it were, the later repeated decisions would govern, but in fact *State v. Bryson*, 84 N. C. 780, merely holds that "the affidavit being not an essential part of the warrant, if the warrant itself charges a criminal offense, it will be sustained." The later cases above cited hold "the affidavit and warrant in contemplation of law are one, if one is referred to

in the other," and if, together, they constitute a charge of a criminal offense, it will be sufficient.

Affirmed.

Highways—Right to Compel Labor on.

Statutes requiring male citizens or inhabitants of a specified age to labor without compensation on the public roads for a certain number of days each year, or pay a certain sum in money for each day's labor thus required, and making it an indictable offense to refuse or fail after notice to comply with the requirements of the statute, are generally held to be constitutional and valid: *State v. Hathcock*, 20 S. C. 419, 47 Am. Rep. 842; *Sawyer v. Alton*, 3 Seam. 127; *Fox v. Rockford*, 38 Ill. 451. No doubt the number of days levied, and the sum which may be received by way of commutation must be uniform within the limits of the district or body imposing such levy: *Pleasant v. Kost*, 29 Ill. 495.

An assessment of labor for the repair of roads is not a tax, and the performance of the labor required on the highway is not the payment of a tax. The word "tax" means a contribution in money, not labor or personal service: *Amenia v. Stanford*, 6 Johns. 92; *Pleasant v. Kost*, 29 Ill. 490; *Fox v. Rockford*, 38 Ill. 452. A statute or ordinance requiring service on the roads is not a capitation or poll tax nor a revenue measure. It is not the imposition of a tax at all, within the meaning of the constitution regulating the assessment and collection of taxes, but is a police regulation: *Galloway v. Tavares*, 37 Fla. 58; *Macomb v. Twaddle*, 4 Ill. App. 254.

A city or town must have legislative authority in order to pass a valid ordinance requiring inhabitants to work upon the highways without compensation: *Galloway v. Tavares*, 37 Fla. 58. A statute imposing compulsory labor upon persons residing in the several election districts of a county, for the purpose of keeping the roads in repair, with the privilege of providing a substitute or the payment of a stipulated sum in lieu of such personal services, is not a levying of taxes by the poll, within the meaning of the state constitution, nor is such law in conflict with the fourteenth amendment to the constitution of the United States: *Short v. State*, 80 Md. 392; *Johnston v. Mayor*, 62 Ga. 645.

A city having power under its charter may enact a valid ordinance imposing the duty of working on the highways of all male citizens between certain ages, and such ordinance may also impose a penalty for a failure to thus work. It is not necessary that the ordinance should fix the precise number of days that each man may be required to work. This may be left to the road overseer without infringing the rule against the delegation of legislative power: *Tipton v. Norman*, 72 Mo. 380. If such labor is imposed by virtue of an ordinance based upon a city charter, and neither makes any exception in favor of persons not able-bodied and there is no constitutional restriction upon the legislation in that respect, the fact

that a citizen upon whom the tax is imposed is not able-bodied, constitutes no defense to the imposition of the labor: *Macomb v. Twaddle*, 4 Ill. App. 254. If, however, road labor duty is imposed only upon able-bodied men by the statute, a man who is not able-bodied is not liable to the penalty prescribed for failure to appear when summoned by the road overseer to perform labor on the roads, and the failure of such person to make his condition known, or the fact that he sent a substitute, who was rejected for incompetency, does not change the rule: *Martin v. Gadd*, 31 Iowa, 75. If authorized by statute, town commissioners have a right to call out its male inhabitants and command their personal labor in repairing the streets of the town: *State v. Halifax*, 4 Dev. 345.

Persons required to perform road duty are entitled to notice as to when the work is to be done, and they have a right to perform the work instead of paying its equivalent in money. The failure to give such notice is not a mere irregularity but the denial of a substantial right: *Chicago etc. Ry. Co. v. People*, 171 Ill. 525; *S. C. & St. P. R. R. Co. v. County of Osceola*, 45 Iowa, 168; *Ryerson v. State*, 24 N. J. L. 622; *Miller v. Gorman*, 38 Pa. St. 309; *Biss v. New Haven*, 42 Wis. 605. If the notice required by statute has not been given to the taxpayer of the time when and place where he must appear and pay his highway tax in labor, the road overseer has no authority to return the tax as unpaid, and, if the amount thereof is illegally collected, the taxpayer may recover it: *Biss v. New Haven*, 42 Wis. 605; *Matteson v. Rosendale*, 37 Wis. 254. An opportunity to work out road tax is always a condition precedent to its collection by legal process: *Miller v. Gorman*, 38 Pa. St. 309. A taxpayer always has the right, upon giving proper notice to the road overseer within whose district he resides, to pay the whole of the road tax in work: *Ryerson v. State*, 24 N. J. L. 622. The failure of the highway overseer to give the statutory notice to a taxpayer to work out his road tax is not a mere irregularity, but the denial of a substantial right, which vitiates the levy: *Chicago etc. R. R. Co. v. People*, 171 Ill. 525. This rule applies as well to nonresidents as to residents, and if a road tax is assessed against nonresidents, notice to work out such tax may be given by advertisement; but the road overseer is bound to permit the tenants of the nonresident to work out his tax if they offer to do so, and, after such offer, an injunction may be granted to restrain the collection of the tax: *Miller v. Gorman*, 38 Pa. St. 309.

There seems to be no doubt that nonresidents who own land within the state where they reside part of the time, together with their tenants or employes, are all liable for road tax or services: *Cantrell v. Pinkney*, 8 Ired. 436. But persons merely passing through the state, or visiting it for the purpose of profit or pleasure, and remaining for days, weeks, or even months, are not liable to road duty: *Cantrell v. Pinkney*, 8 Ired. 436. A male person, however, who resides in the state and pursues a vocation for his

income for an indefinite period is liable to road duty, although he is a citizen of another state, to which he intends to return when he completes his present employment: *State v. Johnston*, 118 N. C. 1188.

It has been held that persons summoned to work on the highways are not excused by the fact that they are constantly employed on the roadbed of a railway company: *State v. Hathcock*, 20 S. C. 419, 47 Am. Rep. 842; *State v. Cauble*, 70 N. C. 62. While this is true of railway section hands, or the like, who have a residence within the road district, it does not apply to railroad employes who are only temporarily within the road district laying a roadbed through it, and who are elsewhere the remainder of the time and do not reside within the district. The latter are not liable for road duty: *On Yuen Hai Co. v. Ross*, 8 Saw. 385; 17 Fed. Rep. 338. A "bar pilot," not exempted by statute from road duty, is not, on account of his occupation, exempt, but, if his presence as a pilot is required on the day that he is summoned, that is a defense in a criminal action for his failure to work the roads. His performance of one public duty excuses his nonperformance of the other at the same time: *State v. Craig*, 81 N. C. 588. If a person is for any reason exempt, he must, upon his arrest and trial for failure to perform road duty, prove all the essential elements which make him exempt: *Hill v. Mayor*, 73 Ala. 74; and in a suit to recover the penalty provided by statute for a neglect or refusal to work upon a road, as directed by the overseer, upon notice from him, evidence on the part of the defendant that the place where he is required to work is not a highway is not admissible: *Reynolds v. Foster*, 89 Ill. 257. Notice to a person summoned to work on the road must be given to him personally by the road overseer or left at the usual place of abode of the person warned. The giving of a written notice to a third person to be delivered to the person summoned is not sufficient: *State v. Wainright*, 60 Ark. 280. An action to recover a fine for failure to work on a public road should be brought in the name of the road overseer: *Bettis v. Nicholson*, 1 Stew. 349.

STATE v. HAWKINS.

[125 NORTH CAROLINA, 690.]

AN INDICTMENT FOR FORCIBLE TRESPASS must charge it to have been committed, not only with force and arms, but also with a strong hand.

TRESPASS, FORCIBLE.—TO CONSTITUTE the criminal offense of forcible trespass upon the premises of another, there must be a forbidden entry or detention with demonstration of force, directly tending to a breach of the peace, and calculated to intimidate or put in fear.

TRESPASS—FORCIBLE—WHAT IS NOT.—An unforbidden entry and holding possession of the premises of another, without any demonstration of force, is not a forcible trespass.

E. Y. Webb, for the appellant.

A. Stronach and Z. B. Walser, attorney general, for the state.

⁶⁹⁰ FURCHES, J. This is an indictment for forcible trespass, and the evidence of the state is that the defendant went to the house of the prosecutrix, and that the prosecutrix was alone, except her three year old child. The defendant went in the house and sat down by the fire and asked the prosecutrix where her husband was. She told him her husband was not at home, but had gone to the field. The defendant was drinking, and said to her, she looked "damn sweet and he would like to kiss her," and started toward her, and she ran out of the house. But she soon returned and told the defendant to leave, and he left. But he cursed and told her not to tell her husband ⁶⁹¹ what he had said; that it would cause her husband to come upon him; that he had as good a pistol as ever fired, and he would kill him; that he had no weapon; that she did not object to his coming in the house, and that he went out when she told him to do so.

The defendant asked the court to charge the jury that upon all the evidence in the case in favor of the state the defendant was not guilty. This prayer was refused, and in this there was error. To constitute the criminal offense of forcible trespass upon the premises of another, there must be an entry or a detention—a holding—after being forbidden to do so. To constitute this offense, it must be charged to have been committed manu forti. An indictment for this offense that charges it to have been committed with force and arms is defective, unless it charges it to have been committed with strong hand. This shows that there must be more than words or acts that would tend to a breach of the peace. If this were not so, every street quarrel or bar-room row would be a forcible trespass.

It is held in *State v. Ray*, 32 N. C. 39, that, to constitute this offense, "there must be demonstration of force, as with weapons or a multitude of people so as to involve a breach of the peace, or directly tend to it, and be calculated to intimidate, or put in fear." This definition has been adopted by some of the best textwriters on criminal law as a correct definition, and is often quoted in our reports. It will be seen that in no view of the evidence in this case does it come up to this

definition of forcible trespass. But the gravamen of this indictment is the entering of the house of the prosecutrix and saying and doing what the state said the defendant did. This must be so, for it will not be contended that if the defendant had said what he did to the prosecutrix on the public streets or public highway, it would have constituted a ⁶⁹² forcible trespass. And to make it a forcible trespass on account of going into the house of the prosecutrix, there must have been an entry after being forbidden, or there must have been a holding of possession—at least a remaining in possession, after being forbidden to do so. But in this case there was neither. The prosecutrix testified that she did not forbid the defendant's coming in, and that he went out when she told him to go. The defendant acted badly and, we think, was guilty of an assault, for which he seems to have been tried and convicted and fined two dollars and fifty cents.

We do not know what considerations influenced the justices who tried this case. But, as the case appears to us, it looks like such a fine as this for such conduct as the defendant was guilty of on an indictment for an assault was a mock of justice. While we think the defendant was guilty of an assault, we do not think he was guilty of a forcible trespass.

Error. New trial.

AN INDICTMENT FOR FORCIBLE TRESPASS which charges that the defendant entered the premises with a strong hand, the prosecutor being then and there present, is sufficient: *State v. Buckner*, Phill. (N. C.) 559, 98 Am. Dec. 83.

FORCIBLE TRESPASS CAN BE COMMITTED ONLY by a demonstration of force amounting to a breach of the peace, or directly tending to it, or such force as is calculated to intimidate or put in fear: Note to *State v. Mills*, 17 Am. St. Rep. 708. See, also, *State v. Ross*, 4 Jones, 315, 69 Am. Dec. 751; *Adams v. Freeman*, 12 Johns, 408, 7 Am. Dec. 327.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

MYERS v. SOUTHWESTERN NATIONAL BANK.

[193 PENNSYLVANIA STATE, 1.]

BANKS AND BANKING—FORGED CHECKS—DUTY OF DEPOSITOR.—If, in an action by a depositor to recover of a bank money alleged to have been paid on forged checks, it appears that the forgeries were made by a confidential clerk of the depositor, who intrusted him with the balancing of his bank and account books, and that the bank was not negligent in honoring the checks, the depositor cannot recover of the bank. He alone is responsible for his failure to examine the checks after payment and reject them within a reasonable time.

A. Simpson, Jr., and F. S. Brown, for the appellant.

J. G. Johnson and F. P. Prichard, for the appellee.

• **STERRETT, C. J.** The only testimony introduced on the trial of this case was that of the plaintiff himself and his witnesses; none was offered by the defendant bank. When plaintiff closed his case ¹⁰ the learned trial judge instructed the jury "to find a verdict for the defendant," which was accordingly done, and judgment was afterward entered on the verdict. The binding instruction under which the jury acted constitutes the only specification of error. The averments of fact on which the plaintiff's claim was based are fully set forth in his statement and need not be recited here at length.

This suit was brought to recover thirteen thousand and ninety dollars, deposited by him in the defendant bank, and paid out by it, as he alleged, on unskillfully executed forgeries of checks, made by his confidential clerk and bookkeeper, without

a careful examination by the proper bank officers of the signatures thereto, because of their acquaintance with and confidence in the forger. He further substantially alleged that said forged checks were abstracted and destroyed by said clerk, who also falsified his (plaintiff's) books and accounts so as to make the apparent balances in the check-book and deposit-book correspond, and that said falsification was so skillfully done as to deceive not only the plaintiff, but also expert accountants employed by him to examine his books, checks, and accounts. He further averred that as soon as the fraud was discovered the forger was arrested, convicted, and sentenced, and the defendant bank was forthwith notified of the loss, but it declined to pay any part thereof.

It was shown on the trial that in March, 1891, the defendant bank opened an account with the plaintiff as a depositor in the usual form, and from that time, for the period of over two years and a half, his deposits, made in the ordinary way, aggregated over six hundred and twenty-two thousand dollars. During all that time, as well as before, plaintiff had in his employ said confidential clerk and bookkeeper, to whom he specially intrusted the business of attending to his bank accounts. That duty included making deposits, occasionally handing in the bank-book to be written up and balanced, and, when that was done, the further duty of receiving the canceled checks, etc., with the payment of which the bank had credited itself, and delivering the same to the plaintiff for examination, approval, etc. In the same connection, it was the duty of the clerk to verify the bank-book, as the same was written up and balanced from time to time by the bank, and report the result ¹¹ to the plaintiff. This he professed to do, but, in fact, he falsely reported that the balance, etc., were correct.

From March, 1891, to November, 1893, the clerk forged checks to the amount of the claim in this case, which were paid by the bank and charged to plaintiff in his bank-book. For the purpose of concealing these forgeries, he falsified his employer's books, and, by misadditions and missubtractions, forced the balances in the check-book so as to make them agree with those in the bank-book. During the period above mentioned plaintiff's bank-book was balanced twelve times. The first settlement included two forged checks, one three hundred dollars and the other two hundred dollars. The last settlement included a three hundred and fifty dollar forged check. The other

forgeries were respectively included in the intermediate settlements. At each settlement the amount of each check, not previously settled and canceled, was entered on plaintiff's bank-book by the bank as charged against him, and the book, together with the checks, was delivered to his clerk for the purpose of examination and verification. If, at the time of each settlement, the forged checks had been examined by the plaintiff, or, if the number and the aggregate amount of the checks had been compared with the number and amounts of the checks separately entered in the bank-book, or, if the checks had been compared with the stubs of the check-book, or if the additions of the deposits and checks on the check-book had been examined the forgery would have been discovered. Neither of these was done, for the reason that plaintiff's unfaithful clerk, who was deputed by him to receive the checks, etc., from the bank, take them to the office and compare the amounts, etc., with the bank-book, abstracted and destroyed the forged checks, and failed to call his employer's attention to the discrepancies which undoubtedly would have resulted from a proper comparison and examination. He did this because he himself was the forger. The result was that, for more than two years and a half after the first forged checks were paid, no complaint was made and no notice of any error in the settlements was given to the bank. It was not the bank's fault that the first forgeries were not promptly discovered and notice thereof given. If plaintiff's duty to the bank had been performed at the proper time, the fact would have appeared that the bank had charged plaintiff on his bank-book with the payment of two items (three hundred dollars ¹² and two hundred dollars) for which no vouchers appeared among the checks handed to him by his clerk. These vouchers, the two forged checks had been abstracted and destroyed by the latter. No objection having been made at the time of the first settlement, the bank had a right to assume that everything was correct, including the two checks purporting to be signed by him. His silence was tantamount to a declaration to that effect, and, in afterward honoring checks signed by the same person, the bank had a right to consider the fact that these signatures had been at least tacitly recognized by the plaintiff as genuine.

While the plaintiff was not chargeable with the knowledge of his clerk that the latter had committed the forgery, he was clearly responsible for the acts and omissions of his clerk in the course of the duties with which he was intrusted, viz., to re-

ceive the checks from the bank, take them to his employer's office, compare the amounts thereof with the amounts in the bank-book and check-book, etc.

In view of the uncontradicted evidence as to the foregoing facts, it cannot be doubted that as between the bank and the plaintiff the latter alone should be held responsible for the consequences resulting from the failure to examine the checks in question and approve or reject them within a reasonable time. In contemplation of law, the delivery of the checks to plaintiff's clerk was a delivery by the bank to the plaintiff himself, as the basis on which its credits were claimed. The bank was therefore entitled to have them examined and, if rejected, returned within a reasonable time. That was not done, and, because of plaintiff's failure to perform his duty in that regard, he should not be permitted to recover. Any other rule would be inconsistent, not only with general and long-established custom, but also with well-settled principles of law on the subject: *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 107; *United Security etc. Co. v. Central Nat. Bank*, 185 Pa. St. 586.

We find no evidence that required submission of the case to the jury. There was no conflict of testimony as to the failure of the plaintiff to perform the duty which, under the undisputed evidence, he owed to the defendant; nor was there any evidence of negligence on the part of the bank that should have been submitted to the jury. The checks purporting to be signed by the plaintiff were destroyed, and of course they were not ¹³ produced. There was not a particle of evidence that the signatures were not such complete fac similes of plaintiff's signature as to be impossible of detection, even by an expert. As correctly stated by counsel for the bank, the clerk did say in reply to questions put by plaintiff's counsel that he was not an expert penman, and that he had never before had any experience in forging other people's names, but he was not asked, and did not say, that the signatures were not made—either by the use of tracing paper or otherwise—so like the originals that they could not be detected by an ordinary inspection. On this point, negligence is not to be presumed, and hence the presumption must be in favor of the bank. In the absence of any evidence, from the signatures themselves or from witnesses, that there was any difference between them and plaintiff's signature which could be detected by the eye, it must be assumed that the forgery was of such a character that the bank, acting with due care and caution, was deceived by it. In fact, there

was no evidence from which the jury would have been warranted in drawing the conclusion that the bank in honoring the checks acted negligently.

After a careful consideration of the evidence, our conclusion is that there was no question of fact that should have been submitted to the jury, and hence there was no error in directing them to find for the defendant.

The judgment is therefore affirmed.

BANKS AND BANKING—FORGED CHECKS.—A bank is bound to know the signature of its depositors, and the payment of a forged check cannot be debited against the depositor if he is wholly free from neglect or fault: *First Nat. Bank v. Allen*, 100 Ala. 476, 46 Am. St. Rep. 80, and note; *Janin v. London etc. Bank*, 92 Cal. 14, 27 Am. St. Rep. 82, and note; *Shipman v. Bank of New York*, 126 N. Y. 318, 22 Am. St. Rep. 821. But it is the duty of a depositor to know whether his account with the bank is correct, and promptly to report a forgery when detected; and if he negligently fails to make the examination and consequent discovery when he could have done so, it is as if he had expressly admitted the genuineness of the checks: *Weinsteln v. National Bank*, 69 Tex. 38, 5 Am. St. Rep. 23. See, too, *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 63 Am. St. Rep. 399; monographic note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 889-899.

BEST v. SMITH.

[193 PENNSYLVANIA STATE, 89.]

HUSBAND AND WIFE—GIFT TO WIFE—CREDITOR'S FRAUD.—A postnuptial settlement on a wife by a husband not indebted at that time is good against his subsequent creditors, if not made with fraudulent intent as to them, and though such settlement may as to existing creditors be fraudulent, it does not even raise a presumption of fraud against creditors whose debts had no existence at the time it was made.

G. S. Ferris, for the appellants.

J. E. Jenkins and H. A. Fuller, for the appellees.

⁹⁰ DEAN, J. This is an ejectment for about one acre of land in the borough of Wyoming, Luzerne county. It appeared at the trial before the referee, to whom the issue was referred by the court below, under the act of April 6, 1869, that on September 26, 1848, Jacob I. Shoemaker, the unquestioned owner of the land, conveyed it by deed to Martha, wife of William Hartzell; the wife then, by a deed in which the husband joined, dated December 23, 1874, for the consideration of two

hundred dollars and natural love and affection, conveyed the same land to their daughter Helen; then, about three years afterward, October 4, 1877, for the consideration of two hundred dollars she reconveyed the property to her mother, Martha Hartzell, who in 1889 died, leaving a will, dated August 4, 1884, by which she devised the property to her husband for life, with remainder to these plaintiffs, her children. William Hartzell, the husband, died December 5, 1895. On June 2, 1880, John B. Smith obtained a judgment in the common pleas of Luzerne county against William Hartzell, the husband, which judgment was kept revived until September 7, 1895, when execution was issued and the lot sold at sheriff's sale; it was purchased by Smith, the judgment creditor, who by his ⁹¹ tenant, Paulhamus, immediately after Hartzell's death, entered into possession, claiming under the sheriff's deed. The remaindermen, these plaintiffs, then instituted this ejectment, claiming title under their mother's will.

The referee, on both facts and law, found for plaintiffs. It was, however, contended earnestly before him and here on appeal, on the authority of *Gamber v. Gamber*, 18 Pa. St. 363, decided in 1852, less than four years after the passage of the act of 1848, that as against a creditor, the land was the husband's. The general language used by Black, C. J., who delivered the opinion in that case, would at first blush rule this one; but notice the facts in that case. There the husband had himself purchased a carriage; the contract had been made by him for the manufacture and it was delivered to and used by him for the comfort and convenience of the family; he died insolvent; his wife claimed the carriage as hers, as against her husband's creditors, on proof of declarations of the husband that he had bought it for her and paid for it with her money. This is what this court said in view of the facts: "Where property is claimed by a married woman, she must show by evidence which does not admit of a reasonable doubt either that she owned it at the time of her marriage, or else acquired it afterward by gift, bequest, or purchase." The question in the case was, Who had title to the article of personalty bought by and in possession of the husband? The court ruled on the measure of proof necessary under such circumstances to establish title in the wife as against her husband's creditors. The question as to whether the attempt was to defraud the particular creditors who made claim at her husband's death was not even suggested; it was assumed on both sides in the court below and in this

court that if she had not bought the carriage with her own money, it would be a fraud on the husband's creditors to allow her on the evidence presented to successfully assert claim thereto after his death. This court held the evidence was wholly insufficient to sustain it. But suppose she had proved that she bought the carriage years before her husband's death with money given to her by him for that purpose; that he at the time and for years afterward owed nobody, and that thereafter she claimed and he acknowledged the carriage to be hers while it was in use, the general language adopted by Chief Justice ⁹² Black would have had no application; the question would have been whether the gift was made with intent to defraud. *Gamber v. Gamber*, 18 Pa. St. 363, was followed afterward in many cases presenting similar facts, and is unquestionably the law. But long before the act of 1848, as well as since, it has been repeatedly held by this court that a postnuptial settlement on a wife by a husband, not indebted at that time, is good against subsequent creditors, if not made with a fraudulent intent as to them. The very purpose of an honest voluntary settlement on a wife is to secure a provision for her against contingencies to which every honest business man is subject; not to secure her against particular debts which he intends to contract, or against disasters in a hazardous business which he proposed to engage in, for in either case such settlement would be fraudulent, but against those misfortunes in business which are remote and cannot with certainty be anticipated.

The distinction between a lawful voluntary settlement and a fraudulent one is noticed in *Greenfield's Estate*, 14 Pa. St. 489, *Snyder v. Christ*, 39 Pa. St. 499, *Townsend v. Maynard*, 45 Pa. St. 198, *Williams v. Davis*, 69 Pa. St. 21, and then in *Harlan v. Maglaughlin*, 90 Pa. St. 293. In this last case, Justice Gordon delivered the opinion of the court; he thoroughly discusses the subject and clearly points out the distinction between a lawful settlement under the statute of 13 Elizabeth and a fraudulent one, citing almost all the authorities in this state bearing on the subject, and emphatically announcing the conclusion of the court that a subsequent creditor can only avail himself of a fraud practiced against him; that a deed void as against existing creditors did not even raise a suspicion of fraud as against creditors whose debts had no existence when it was made.

In view of the law as thus clearly settled, look at the facts of this case; those claiming under the mother's will did not at-

tempt to prove that she ever paid one dollar for the property which she devised to her children; but the record showed that it had been conveyed to her by Shoemaker in 1848; then, after standing in her name and being occupied by her for twenty-five years, she, joined by her husband, conveys it to her daughter, without change of possession; the daughter held it in her name for three years, and then reconveyed to the mother, and the deed is put ⁹³ of record; three years afterward, in 1880, while the mother and husband were still in the occupancy of the land, Smith obtained judgment against the husband, and on it sold his interest, and under that deed went into and claimed possession after the husband's death, against the devisees of the wife. What title had the husband as between him and his creditors? The creditor's debt, so far as is proved, had no existence prior to 1880; the wife's title from Shoemaker was thirty-two years before. Certainly, plaintiffs were not bound to prove that the two hundred dollars consideration in that deed had been obtained from a source other than her husband. Suppose he did furnish the money; he had a right to do so as against a creditor who may not then even have been born. But, assume that her title dated only from the reconveyance by the daughter, which antedated the debt only three years; the evidence clearly showed that the mother had an estate to the value of the land when she conveyed to the daughter, and it tended to show that the daughter, not desiring to pay, reconveyed to the mother. Assume the husband paid the two hundred dollars consideration to the daughter, the deed was placed of record, and with that before his eyes, three years afterward, Smith, the creditor, contracted with the husband his debt; there is nothing in this evidence that warrants a presumption that when the husband furnished his wife two hundred dollars he intended to defraud Smith, a creditor who had no existence until three years afterward. If such were the fact, the creditor was bound to prove it by proper evidence; there was no presumption of fraud in his favor.

It is a matter of surprise to us that since *Harlan v. Maglaughlin*, 90 Pa. St. 293, the distinction there so clearly pointed out between a lawful settlement on a wife, as against creditors, and a fraudulent one, is still unperceived by some counsel; more than once since that decision we have been forced to call attention to it, as we again do now. All the assignments of error are overruled and the judgment is affirmed.

HUSBAND AND WIFE.—A VOLUNTARY CONVEYANCE from a husband to his wife is valid as to everybody except existing creditors, and may be valid as to them, as when he is solvent at the time of the conveyance; *Note to Henderson v. Henderson*, 19 Am. St. Rep. 657.

SHERRARD v. JOHNSTON.

[193 PENNSYLVANIA STATE, 166.]

EXECUTION LIENS.—If neither of two judgments is a lien on after-acquired land, the first levy of an execution creates the first lien on the fund arising from the sale of such land. Although such levy is made under the junior judgment, it still has priority, if the debtor makes no objection, notwithstanding the fact that such judgment is more than five years old and has not been revived by *scire facias*.

SCIRE FACIAS.—A levy under an execution on a judgment more than five years old, without an issue of a *scire facias* thereon, is irregular merely, and not void. Such irregularity cannot be taken advantage of by another judgment creditor, but only by the judgment debtor.

JUDGMENTS—LIFE OF.—As between the parties, a judgment unpaid remains in force notwithstanding the expiration of its lien. It is not presumed to be paid until after the lapse of twenty years, although after five years it is presumed that the debtor may have a valid defense against an execution, and the law requires that he shall have an opportunity to show it before his land is seized. In such case a *scire facias* should issue before the levy of the execution.

JUDGMENTS—SETTING ASIDE FOR FRAUD.—A judgment fraudulent as to the debtor cannot be set aside by creditors unless there is collusion or fraud as to them. The same rule applies when the judgment is not fraudulent or void, but merely irregular.

Three judgments were rendered against T. R. Torrence and remained unsatisfied at the time of the levy of the execution in this case. The first judgment was in favor of A. Morton, and was dated August 12, 1876. The second was in favor of C. M. Banning, and dated July 20, 1888. The third was in favor of Sherrard, dated October 4, 1894. Levy of execution was made under the Banning judgment November 24, 1897, and levy was made under the other two judgments November 25, 1897.

E. Campbell, for the appellant.

J. M. Core, for the appellee.

¹⁷² MITCHELL, J. The levy on the Banning judgment to the use of appellant was made on November 24th, while that

on appellee's judgment was not until the next day. Neither judgment being a lien on the land, which was after-acquired, the first levy had the first grasp on the fund: Packer's Appeal, 6 Pa. St. 277. But the appellant's judgment being more than five years old, the learned auditor held that it would not support an execution, and he therefore distributed the fund first to the appellee. In so doing, however, he overlooked the point that the objection was not made by the debtor defendant, and was not available to anyone else.

The execution on the Banning judgment was not void, but merely irregular. As between the parties a judgment unpaid remains in force notwithstanding the expiration of its lien. There is no affirmative presumption of payment until after the lapse of twenty years, though after a certain length of time, fixed by the act of April 16, 1845 (Pub. Laws, 538), at five years, the law assumes that the defendant may have a valid reason against an execution, and therefore requires that he shall have an opportunity to show it before his land is seized. This provision, however, is for the benefit of the debtor, and, if he refuses or neglects to take advantage of it, no one else can. The object of the *scire facias* to revive et quare executionem non, etc., is to give the debtor notice that he may be exposed to an ¹⁷³ execution unless he shows cause against it. It requires a valid defense, and if he has none or refuses or neglects to present it, a new judgment will be entered on which execution may at once be issued. No other creditor has any standing to interject a defense for him in the *scire facias*, and no reason exists for allowing such interference if the plaintiff should assume that there is no defense and issue execution without the preliminary *scire facias* at all.

These principles were stated by Kennedy, J., in *Righter v. Rittenhouse*, 3 Rawle, 273, as follows: "At common law, after a year and a day had elapsed from the date of the judgment in personal actions, without execution being issued thereon by the plaintiff, a presumption arose that the defendant might be able to show that it was paid or discharged; and after that, without affording him an opportunity to do so, the plaintiff could not take out execution upon his judgment. To enforce the payment of it, he was compelled to bring an action of debt upon it and to prosecute the same until he obtained a new judgment, upon which he might sue out execution. To avoid the delay that attended this course of proceeding, the statute of Westminster 2d gave a *scire facias* upon the judgment in such ac-

tions after a year and a day, requiring the defendant to show cause, if any he had, why the plaintiff should not have execution of his judgment. An execution sued out after the year and a day was never considered void, but voidable merely."

It is firmly settled that even a judgment which is fraudulent as to the debtor cannot be set aside by creditors unless there is collusion or fraud as to them: *Thompson's Appeal*, 57 Pa. St. 175; *Zug v. Searight*, 150 Pa. St. 506. And a fortiori must the same rule be applied where the judgment or the proceeding upon it is not fraudulent or void, but merely irregular. In *Drexel's Appeal*, 6 Pa. St. 272, judgment against the Towanda Bank was entered by confession on a warrant signed by the president only, in his own name. It was held that the other creditors of the bank had no standing to impeach the judgment, this court saying: "It might have been reversed on a writ of error, or set aside in the court below on motion, but only at the instance of the defendant, never at the instance of a stranger. As long as the party injured by the irregularity submits to it, no one else can complain; for a third party has a right to interfere with a ¹⁷⁴ judgment only when it is collusive." See, also, *McLaughlin v. McLaughlin*, 85 Pa. St. 317, where a number of analogous cases are cited in the opinion on page 323.

The cases relied upon by the learned auditor do not touch this point. In *Miller v. Miller*, 147 Pa. St. 545, and *Bannan v. Rathbone*, 3 Grant Cas. 259, the court acted on the motion of defendant. In *Lyon v. Cleveland*, 170 Pa. St. 611, 50 Am. St. Rep. 782, the question arose on a motion by a terretenant, acquiring title to the land while subject to the lien of plaintiff's judgment, to strike off a levy on a revived judgment, to which the terretenant was not party. What was decided was that until the purchaser put his title on record, took possession, or in other way gave actual or constructive notice to the plaintiff, a revival against the original debtor would bind the land. The remarks of our late brother Williams by way of argument and illustration must be read with reference to the state of facts in the case before him. It was not intended to say that the lien of a judgment and the right to issue execution were identical, or that the existence of the former depended on the latter. Under the act of April 4, 1798 (3 Smith's Laws, 331), the lien of a judgment continued for five years, though no execution could be issued on it after a year and a day without preliminary scire facias, until the period was extended to five years by the act of 1845. It is argued by ap-

pellees that appellant has not sufficiently proved the assignment of the Banning judgment to her. But the recovery is in the right of the legal plaintiff. No third party has any standing to question the status of the plaintiff to use.

Judgment reversed and fund directed to be applied first to the judgment of Catherine Banning. Costs to be paid by appellees.

EXECUTIONS ISSUED ON DORMANT JUDGMENTS.—Under a statute providing that after five years an execution shall not issue upon any judgment except on motion followed by the issuance of summons as in actions at law, an execution issued without such proceedings is not void, but merely voidable, and is not subject to collateral attack: *Eddy v. Coldwell*, 23 Or. 163, 37 Am. St. Rep. 672. See, too, *Ingram v. Belk*, 2 Strob. 207, 47 Am. Dec. 591.

ON SCIRE FACIAS TO REVIVE JUDGMENTS: See the monographic note to *Frierson v. Harris*, 94 Am. Dec. 222-246.

NORTHERN CENTRAL RAILWAY CO. v. WALWORTH.

[193 PENNSYLVANIA STATE, 207.]

SPECIFIC PERFORMANCE—SALE OF STOCKS AND BONDS.—The subsequent sale and delivery of stocks and bonds to other parties in disregard of a prior contract with the plaintiff, is no defense to a bill for specific performance, especially when such parties had knowledge of the prior contract, and are made parties and sought to be enjoined.

CONTRACTS—MUTUALITY—SPECIFIC PERFORMANCE. The principle that contracts must be mutual—must bind both parties or neither—does not mean that in every case each party must have the same remedy for a breach by the other, but that the contract is enforceable on both sides, in some manner—not necessarily enforceable on both sides by specific performance.

CONTRACTS—UNCERTAINTY.—A contract for the sale of stock whereby the seller agrees that all debts of the company shall be paid on the day of the transfer, and the purchaser is to retain sufficient of the price to assure him that the company is free from debt, is not void for uncertainty in not stating such debts, if the amount to be paid is fixed and definite.

SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF CHATTELS.—The rule that a bill in equity cannot be maintained for the specific performance of a contract for the sale of chattels does not apply if the articles sold are of such a nature that they cannot be purchased in the market.

SPECIFIC PERFORMANCE—CONTRACT FOR PURCHASE OF STOCK.—A contract for the sale of nearly all of the bonds and stock of a corporation with an agreement that the vendor shall pay the interest and floating corporate debt, and use his best endeavors to secure to the vendee the remaining corporate stock and bonds at the lowest possible price, does not lack mutuality, and may be specifically enforced.

CORPORATIONS—PURCHASE OF STOCK OF ANOTHER CORPORATION.—A contract for the purchase by a railroad company of the stock of another railway is not against public policy if the two roads are not parallel or competing lines, and such purchase is authorized by statute.

N. M. Wanner and H. Keesey, for the appellant.

H. C. Niles and J. S. Black, for the appellees.

210 GREEN, J. By the very explicit and plainly expressed terms of the written ²¹¹ contract in question in this case, the defendant, Warren F. Walworth, agreed to sell and deliver to the plaintiff, on or before the twenty-fifth day of June, 1898, certificates for ten thousand shares of the capital stock of the York Southern Railroad Company, and one hundred and forty-two thousand dollars of the five per cent bonds of the same company due in 1944. In consideration of the said sale and transfer the plaintiff agreed to pay to the vendor the sum of one hundred and sixty thousand dollars. There is not the least element of doubt or uncertainty as to what this contract is and means. It means just what it says, and what it says is so plainly and clearly expressed that a description of its meaning would be merely a repetition of its words. The vendor further agreed that the railroad company should be free of debt, except its mortgage debt of three hundred and ninety-nine thousand nine hundred and fifty dollars, and its car trust notes, not exceeding four thousand dollars, and he agreed also that he would pay all the interest due on the mortgage debt and car trust notes, and the principal and interest of all the floating debt of the company up to the time of delivery, June 25, 1898. To make sure of the payment of these items it was further agreed that the vendee, the plaintiff, might retain out of the purchase money so much as was sufficient to make the payment. The foregoing are the whole of the terms of the sale, and it is scarcely necessary to repeat that they are absolutely free of any question as to their meaning. The vendor agreed that he would use his best endeavors to secure for the vendee the remaining two thousand shares of the stock of the railroad company, and the remaining eight thousand dollars of its mortgage bonds, at the lowest price practicable, and that he would submit the accounts, books, and records of the company to the examination of a representative of the vendee, but these stipulations were merely ancillary, and constituted no part of the actual contract of sale. The bill alleges and the

demurrer necessarily admits that the vendee, at the request of the vendor, extended the time of performance from the twenty-fifth day of June to the thirty-first day of July, 1898. And the bill further avers, and the demurrer does not deny and necessarily admits, that the vendee was ready and willing to comply with its part of the contract in all respects, both on the twenty-fifth day of June and on the thirty-first day of July, but that the vendor failed and neglected to comply with his part of the contract on either of those dates. The bill further alleges, and the demurrer does not deny and necessarily admits, that on the twenty-seventh ²¹² day of August, 1898, the vendor absolutely refused to perform his part of the said contract of sale, and declared the same terminated. The bill further avers that after the execution of the contract of sale the defendant Walworth, in fraud of plaintiff's rights, sold and delivered the said stock and bonds to other of the defendants, naming them, and that these other defendants, when they bought and received the said stock and bonds, had knowledge and were advised of the previous contract made by said Walworth with the plaintiff, and colluded with Walworth for the delivery of the stock and bonds to themselves in fraud of the plaintiff's rights. Some amendments to the bill were allowed, but as they are not material to the controversy in its present state, they are not now considered.

The demurrer filed by the defendants to the bill contains a number of averments, many of which are of so trivial a character as not to require consideration. The learned court below refused a special injunction, and subsequently sustained the demurrer and dismissed the bill. The reasons for this action are expressed in the opinion filed, and they are chiefly to the effect that the contract is too uncertain and indefinite in its terms; that the contract lacks mutuality, and is "loaded down with conditions contradictory and incapable of performance"; that a bill for specific performance is an appeal to the conscience of a chancellor, who will not order its performance if it is hard or unconscionable; that the bill does not show irreparable injury; that the securities have been transferred to the parties, and that specific performance will not be decreed in Pennsylvania of contracts for the sale of stocks and chattels. We find ourselves quite unable to agree with any of these conclusions. We have already considered the averment of uncertainty and indefiniteness in the terms of the contract. We have endeavored to show that there is nothing indefinite or un-

certain about it, but that its terms are plainly and clearly expressed, and we cannot conceive of any reason why they cannot be specifically performed. The subsequent sale and delivery of the securities to other parties in disregard of the earlier contract with the plaintiff is not of the least consequence as a defense, most especially when the bill avers that those parties had knowledge of the prior contract with the plaintiff, and they are made parties to the bill and are asked to be enjoined. We do not discover any ²¹³ want of mutuality in the contract. If the vendor had performed his part of the contract and the vendee had refused to take the securities upon tender of them being made, we know of no reason why specific performance could not be decreed against the plaintiff. We are not referred to any authority holding the contrary of such a doctrine. Certainly, an action for damages would lie, in which the whole contract value of the securities could be recovered, and that is a sufficient reply to the allegation of "want of mutuality." In *Jennings v. McComb*, 112 Pa. St. 518, we said: "The principle that contracts must be mutual, must bind both parties or neither, does not mean that in every case each party must have the same remedy for a breach by the other. Covenants may lie against one, where only assumpsit can be maintained against the other: *Grove v. Hodges*, 55 Pa. St. 504." In the note, on page 940, of 22 *American and English Encyclopedia of Law*, first edition, it is said: "The mutuality required is that which is necessary for creating a contract enforceable on both sides in some manner, but not necessarily enforceable on both sides by specific performance."

The contention that the contract is uncertain because the amount of the interest on the mortgage bonds and the car trust notes is not stated, and the amount of the floating debt of the company is not given, and therefore the contract does not disclose how much money is to be paid for the securities, is of no force. The amount to be paid is fixed and definite—one hundred and sixty thousand dollars. There is no amount to be deducted, unless the vendor defaults in his agreement to pay the interest on the bonds and note and the principal and interest of the floating debt, and such default is not to be presupposed. But if it occurs the vendor can show what the amounts to be deducted are, and thus these amounts can be rendered certain, and that is certain which can be made certain. The only other contention of any importance is the one that bills in equity will not lie in Pennsylvania for the specific performance of contracts

for the sale of chattels. While this is true as a general rule, it is not true where the articles sold are of such a nature that they cannot be purchased in the market. This contract is for the sale and purchase of almost the whole of the bonds and stock of this particular company. These securities cannot be had nor obtained except under and by force of this particular ²¹⁴ contract. They cannot be bought in the general market, because they do not exist. Outside of this contract there are but two thousand shares of stock and eight thousand dollars of bonds; hence, it is not possible for the plaintiff to obtain the bonds and stocks which the defendant Walworth agreed to sell him, except by the specific performance of this contract. This consideration constitutes a well-established exception to the general rule which denies specific performance to executory contracts for the sale of chattels. This whole subject was discussed in the opinion of this court delivered by Clark, J., in the case of Goodwin etc. Co.'s Appeal, 117 Pa. St. 514, 2 Am. St. Rep. 696, and the exception to the rule as above stated was clearly recognized and enforced. On page 534 it is said in the opinion: "The same general principles govern in contracts for the sale of stocks of this character as in the sale of other personal property; if the breach can be fully compensated equity will not interfere; but when, notwithstanding the payment of the money value of the stock, the plaintiff will still lose a substantial benefit, and thereby remain uncompensated, specific performance may be decreed: Waterman on Specific Performance, sec. 19. . . . The doctrine has in some cases been carried to this extent that if a contract to convey stock is clear and definite, and the uncertain value of the stock renders it difficult to do justice by an award of damages, specific performance will be decreed."

The case of Foll's Appeal, 91 Pa. St. 434, 36 Am. Rep. 671, cited for the appellee, has no application. The decision was founded upon the special and highly exceptional facts stated in the opinion, which do not appear in this case. Moreover, there were but fifteen shares involved in that controversy, and there were several hundred more shares in the hands of other persons which were susceptible of purchase. It nowhere appears on the record of this case that there is anything contrary to public policy in specifically executing this contract. The sufficiency of that reason for the decision of Foll's Appeal, 91 Pa. St. 434, 36 Am. Rep. 671, may well be questioned. To the writer it is not at all sufficient, but the other reason, that there was other

stock open to purchase, was of controlling force. In the present case, however, the contention founded upon a supposed public policy adverse to the acquisition of control by any one interest is altogether inapplicable. The public policy of a state is certainly indicated by its legislation. ²¹⁵ In *Carpenter's Estate*, 170 Pa. St. 203, 50 Am. St. Rep. 765, we said: "How can there be a public policy leading to one conclusion when there is a positive statute directing a precisely opposite conclusion? There can be no public policy which contravenes the positive language of a statute." In *Van Steuben v. Central R. R. Co.*, 178 Pa. St. 367, we said: "The public policy of a state is to be deduced from the general course of legislation and the settled adjudications of its highest courts."

By our acts of April 23, 1861 (Pub. Laws, 410), and its supplements of March 17, 1869 (Pub. Laws, 11), February 17, 1870 (Pub. Laws, 31), and May 16, 1861 (Pub. Laws, 702) railroad companies were fully authorized to lease, make traffic contracts with, or purchase the stock, bonds, etc., of other railroad companies, and these laws and the numerous decisions under them most clearly favor the existence of a public policy sanctioning all transactions of that character. In the case of *Bald Eagle etc. R. R. Co. v. Nittany etc. R. R. Co.*, 171 Pa. St. 284, 50 Am. St. Rep. 807, it was said by our brother Dean in the opinion: "The right of one road to lease, make traffic contracts with, or consolidate with connecting roads not parallel or competing has not for thirty-four years been doubted, that we know of. The act of April 23, 1861, expressly confers such right, and the constitution does not affect it except to prohibit the consolidation and leasing of parallel and competing lines. The rights of connecting roads under that act have been recognized many times since the adoption of the constitution of 1874; and that contracts for through business, both freight and passenger, between connecting railroads and shippers are not only not *ultra vires*, but, on the contrary, have for their basis sound business principles, and special contracts may be made with a special class of shippers to secure business. . . . It is not seldom those who have reaped benefits from a contract such as this seek to escape its obligations by taking refuge in that assumed turpitude which, on grounds of public policy, avoids the contract; but here—and it is a gratification to us to say it—the parties to this contract violated no law, restrained not others from engaging in business, did nothing of evil example or detrimental to public morals; therefore, there is no public policy

which, in the absence of express legislative enactment, makes void this contract."

The act of April 23, 1861 (Pub. Laws, 410), contains the following provision: "That it shall and may be lawful for any railroad ²¹⁶ company created by and existing under the laws of this commonwealth, from time to time, to purchase and hold the stock and bonds, or either, of any other railroad company or companies chartered by or of which the road or roads is or are authorized to extend into this commonwealth."

In the face of such legislation it is idle to talk of a purchase of the bonds and stocks of one railroad company by another being contrary to the policy of the law. It is almost unnecessary to add that there is nothing on this record showing or tending to show that the York Southern Railroad is a parallel or competing line with the Northern Central Railway.

With reference to the contention that there is an adequate remedy at law, and that the bill does not show an irreparable injury, it is enough to say that under the case disclosed by the bill the plaintiff has no remedy at law, and that the plaintiff's injury is necessarily irreparable in every equitable sense, if the plaintiff does not acquire the bonds and stock which they purchased and aver their readiness and willingness to pay for. It was these bonds and stock which they bought, and which they had a perfect legal right to buy. If they cannot have them their injury is necessarily irreparable, because they lose the very subject matter of their contract. A money consideration, even if it could be obtained, is no substitute. The assignments of error are all sustained.

The decree of the court below is reversed and the demurrer is overruled. The defendant is ordered to answer the bill under penalty of a decree pro confesso, and the record is remitted for further proceedings, the costs to be paid by the defendants.

SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY.—A plaintiff's right to specific performance does not depend upon the defendant's right to that remedy: *Hickey v. Dole*, 66 N. H. 336, 49 Am. St. Rep. 614. Compare note to *Grimmer v. Carlton*, 27 Am. St. Rep. 173.

SPECIFIC PERFORMANCE—PERSONALTY.—Equity will decree the specific performance of a contract to convey personal property if like property cannot be obtained elsewhere, or if the loss cannot be compensated adequately by damages in an action at law: *Manton v. Ray*, 18 R. I. 672, 49 Am. St. Rep. 811.

SPECIFIC PERFORMANCE—CONVEYANCE OF STOCK.—Equity will decree the specific performance of a contract to convey

corporate stock if it cannot be obtained elsewhere than from the respondent, and its value is uncertain and not easily ascertainable: *Manton v. Ray*, 18 R. I. 672, 49 Am. St. Rep. 811; or if there has been a betrayal of confidence: *Steinmeyer v. Siebert*, 190 Pa. St. 471, 70 Am. St. Rep. 641. See, too, *Goodwin Gas Stove etc. Co.'s Appeal*, 117 Pa. St. 514, 2 Am. St. Rep. 696; note to *Foll's Appeal*, 36 Am. Rep. 674, 675. But specific performance of a contract to sell shares of a national bank will not be enforced if it appears that the shares were designed to give control of the bank: Note to *Eckstein v. Downing*, 10 Am. St. Rep. 409.

McCAFFERTY v. PENNSYLVANIA RAILROAD COMPANY.

[193 PENNSYLVANIA STATE, 339.]

RAILROAD ACCIDENT—PRESUMPTION OF NEGLIGENCE.—An injury to a railway passenger caused by a defect in the track raises a presumption of negligence against the railway company, which carries the case to the jury, although the evidence to rebut such presumption may be very strong.

RAILROADS—INJURY TO PASSENGER—PROXIMATE CAUSE OF DEATH.—If a passenger injured on a railway dies more than a year after the accident, the immediate cause of death being an abscess of the liver, and the evidence shows that he had never recovered from the effects of the accident, that he had la grippe one month before he died, that the injury received in the accident was apparently internal and indicated a serious derangement of the liver before the attack of la grippe, the question of the proximate cause of the death is for the jury to determine.

NEGLIGENCE—INJURY CAUSING DEATH—RIGHT OF ACTION—MEASURE OF DAMAGES.—If a person injured by the negligence of another has brought an action to recover therefor and then died, the action can be maintained or continued only by his executor or administrator, and the measure of damage is the loss sustained by the deceased by reason of the injury. No recovery can be had for the loss sustained by third parties by reason of his death.

J. M. and W. C. Thompson, for the appellant.

T. C. Campbell, J. M. Galbreath, and J. B. McJunkin, for the appellee.

344 **FELL, J.** On the question of the defendant's negligence the case was clearly for the jury. The accident was caused by a broken rail. This rail had been in use for sixteen years as the outside rail on a sharp curve, and had been worn by the flanges of the car wheels so that its weight had been reduced from sixty to fifty-five pounds per yard. It had been broken some months before the accident, and had been repaired by the use of splices or side bars, and admittedly it was greatly

weakened by both the wear and the fracture. In the face of this testimony it is idle to say that the case could have been withdrawn. Moreover, as the injury was to a passenger riding in the defendant's car, and was caused by a defect in the roadway, there was *prima facie* a presumption of negligence which carried the case to the jury. This presumption, having once arisen, remained until overcome by countervailing proof. Whether it was so overcome was a question of fact for the jury. It had the same effect in shifting the burden of proof that affirmative evidence of negligence would have had: *Pennsylvania Ry. Co. v. Miller*, 87 Pa. St. 395; *Pennsylvania R. R. Co. v. Weiss*, 87 Pa. St. 447; *Spear v. Philadelphia etc. R. R. Co.*, 119 Pa. St. 61. In *Pennsylvania R. R. Co. v. Weiss*, 87 Pa. St. 447, it was said: "The presumption of fact in law which carries a case to the jury necessarily leaves them in possession of the case, and, although the evidence to rebut the presumption may be very strong, yet it is a matter for the jury and not for the court."

The connection between the accident and the death was not ³⁴⁵ clearly established. The deceased was injured by the derailment of the car in which he was riding on April 1, 1896. He lived until April 12, 1897, and the immediate cause of his death was an abscess on the liver. A month before he died he had a severe attack of grippe. It was incumbent on the plaintiff to show with reasonable certainty that the abscess was caused by the injury received. This it was difficult to do, as the disease is one whose origin is difficult to trace. The medical testimony produced by the plaintiff was in itself far from convincing; but it was fortified by proof that her son had never recovered from the effects of his injuries, and that they were apparently internal and indicated a serious derangement of the liver before he had the grippe. We are not prepared to say that the court should have instructed the jury that the testimony did not warrant the conclusion that the death was the natural and proximate consequence of the accident. The question, however, is one which should be submitted with most careful instructions.

The instruction as to the measure of damages was erroneous in that it permitted a recovery for two distinct causes of action. The action was commenced by the deceased six months before his death, and after his death it was carried on by his mother, who, as administratrix of his estate, had been substituted as plaintiff. This was done under section 18 of the act of April 15, 1851, which gives to a common-law action the quality of

survivorship. The nineteenth section of the same act creates a new right of action, unknown to the common law, and limited to cases where death has resulted from violence or negligence, and no suit has been brought by the injured party in his lifetime. The act of April 26, 1855, designates the persons who may exercise the right conferred by section 19 of the act of 1851: *Huntingdon etc. R. R. Co. v. Decker*, 84 Pa. St. 419; *Birch v. Pittsburg etc. Ry. Co.*, 165 Pa. St. 339. Under these acts two actions cannot be sustained for the same injury. If the party injured has brought an action and died, it may be continued by his executor or administrator for the benefit of his estate, but in such a case no new action can be brought under section 19. If he has not brought an action, the parties designated by the act of 1855 may do so, and the recovery is in their right: *Taylor's Estate*, 179 Pa. St. 254; *Maher v. Philadelphia Traction Co.*, 181 Pa. St. 391.

340 If the action is continued for the benefit of the estate, the measure of damages is the loss sustained by the injured party. In the opinion in *Maher v. Philadelphia Traction Co.*, 181 Pa. St. 391, it was said by the present chief justice: "As the action had been brought in the lifetime of the injured party and had survived by virtue of section 18 of the act of 1851, it logically follows that the damages recovered by her personal representatives should be the same as she could have recovered had death not ensued. Included therein are damages for her pain and suffering up to the time of her death, and diminution of earning power during a period of life which she would have probably lived had the accident not happened. It is a mistake to suppose that the recovery in this case is for the death. It is still for the personal injury." In some cases it has been said that the measure of damages includes the value of the life. But by this was not meant the value of the life to others, but the value of the advantages of which the injured party was deprived because of the diminution or loss of earning power. When an action is brought after death by the "husband, widow, children, or parents of the deceased," as provided by the act of 1855, the right of recovery is in the party entitled to sue, and the measure of damages is the pecuniary loss sustained by reason of the death: *Pennsylvania R. R. Co. v. Butler*, 57 Pa. St. 335.

The instruction given in this case permitted the jury to cumulate the damages, and to render a verdict both for the loss

which the deceased sustained by reason of his injuries and for the loss which his parents sustained by reason of his death. This was clearly wrong.

The contention that the assignment of the action by the deceased is a bar to its further prosecution is without merit. The administratrix was the person empowered by the act of 1851 to continue the action, whoever may be entitled to the amount received. If any question should arise between the assignee of the action and the creditors of the estate, it can be adjusted hereafter in the proper proceeding. This is not a matter which concerns the defendant.

The assignments of error which relate to the measure of damages are sustained, and the judgment is reversed with a *venire facias de novo*.

NEGLIGENCE—PRESUMPTION FROM ACCIDENT.—IF A PASSENGER receives injuries from the derailment of a railway car, the presumption is that such derailment resulted from the negligence of the carrier. This presumption can be rebutted only by satisfying the jury that the derailment was not due to any negligence, and could not have been prevented by the exercise of the highest degree of care, skill, and diligence on the part of the carrier: *Alabama etc. R. R. Co. v. Hill*, 93 Ala. 514, 30 Am. St. Rep. 65. See, also, *Bergen County Traction Co. v. Demarest*, 62 N. J. L. 755, 72 Am. St. Rep. 685, and note; monographic note to *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490-495.

NEGLIGENCE—PROXIMATE CAUSE OF DEATH.—Under statutes allowing recovery of damages by the representatives of a person killed, the defendant is responsible, although an illness intervenes between the original injury and the death of the victim, provided that such illness is of a kind which may reasonably be expected to follow the injury: See the monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 828. The question of causal connection between a wrongful act and the injury complained of is ordinarily for the jury: *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 851.

DAMAGES FOR DEATH BY WRONGFUL ACT is the subject of the extended note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 375-383. See, also, *Garrick v. Florida Cent. etc. R. R. Co.*, 53 S. C. 448, 69 Am. St. Rep. 874.

BARNES v. BLACK.

[193 PENNSYLVANIA STATE, 447.]

HUSBAND AND WIFE—FRAUDULENT CONVEYANCES. A deed of land from a husband to his wife, fraudulent as to his creditors at the time when it is made, cannot be sustained by relation back to an antenuptial agreement resting in parol. Marriage is not such part performance as will, in equity, take the case out of the statute of frauds.

HUSBAND AND WIFE—DEED—CONSIDERATION—EVIDENCE.—If a wife claims land under a deed from her husband as against his creditors, she is entitled to prove that the real consideration for the deed was an antenuptial parol agreement, and not the money consideration, nor love and affection enumerated in the deed, but the exclusion of such evidence is not ground for reversal of the judgment, if its admission would have availed nothing.

HUSBAND AND WIFE—FRAUDULENT TRANSFERS—EVIDENCE.—If a wife claims land, as against her husband's creditors, under a deed from him based upon an antenuptial parol agreement, his acts and declarations prior to such agreement are admissible in favor of his creditors.

W. F. Stewart, A. Evans, J. W. Leech, and F. P. Martin, for the appellant.

G. A. Jenks, W. H. Rose, and C. Corbet, for the appellees.

⁴⁵⁰ MITCHELL, J. The main question in this appeal has been conclusively settled since the trial of the case by Flory v. Houck, 186 Pa. St. 263, where it was held that a deed of land from a husband to his wife, which is fraudulent as against creditors at the time it is made, cannot be sustained by relation back to an antenuptial agreement in parol. The differences in the facts between that case and this in regard to the lapse of time, etc., are not material to the principles of the decision. The cases based on the reliance of the wife on the husband's representations, and her freedom from participation in any fraud, are not applicable, for, as was there said, the objection is not to the validity or sufficiency of the consideration of marriage, but to the conveyance of land by parol. For the same reason the absence of the fourth section of the statute of frauds, 29 Charles II, does not change the result. The argument, further urged by appellant's counsel, that marriage is such part performance as in equity will take the case out of the statute, was also fully considered and overruled in that case.

The deed from Barnes to appellant recited a consideration of five dollars, "and the further consideration of love and affection for my said wife." The plaintiff was entitled to prove that the

real consideration was the antenuptial agreement. It was not, in the language of Buckley's Appeal, 48 Pa. St. 491, 88 Am. Dec. 468, directly inconsistent with the consideration expressed, and it was therefore error to exclude it. But as the antenuptial ⁴⁵¹ agreement, if proved, would not have been of avail against the creditors, the error did no injury to appellant.

The third and sixth assignments must be overruled. The evidence objected to amounted to much more than mere declarations of the husband. The witnesses testified to actual money transactions in their presence, whereby the husband became indebted. But even as declarations they would have been admissible. The fact inquired into was whether the husband was in debt to the parties named at the time referred to, which was long prior to his marriage to the plaintiff and to the antenuptial agreement. At the time they were made they were adverse to his own interest and his future wife had no interest in the matter. His declarations, therefore, even as against her, stand on the same footing as those of a grantor before he has parted with his title. The legal objections are not to the competency of the facts as evidence, but to the proof of them by the husband against the interest of the wife. Cases like *Martin v. Rutt*, 127 Pa. St. 380, where the declarations of the husband after marriage and post litem motam are excluded, rest on entirely different grounds.

The other assignments do not require special notice. The records were in evidence as part of the defendant's title, and were submitted with the other evidence, with the instruction to the jury that the question for them was the good faith of the judgments, "that is, Do they represent valid debts existing at the time they were obtained?" That was the only issue in the case, and it was properly submitted. It is the appellant's misfortune that the jury decided it against her.

Judgment affirmed.

STATUTE OF FRAUDS.—MARRIAGE IS NOT SUCH PART PERFORMANCE of a verbal agreement to convey real property, in consideration of the marriage, as will take the contract out of the statute of frauds: *Peek v. Peek*, 77 Cal. 106, 11 Am. St. Rep. 244; *Welch v. Whelpley*, 62 Mich. 15, 4 Am. St. Rep. 810. See, too, *Nowack v. Berger*, 133 Mo. 24, 54 Am. St. Rep. 663.

FRAUDULENT CONVEYANCES — GRANTOR'S DECLARATIONS.—If a conveyance is claimed to have been in fraud of creditors, the declarations of the grantor prior to the conveyance are admissible as evidence of his fraudulent intent: *Bridge v. Eggleston*, 14 Mass. 245, 7 Am. Dec. 209; *Covanhovan v. Hart*, 21 Pa. St. 495, 60 Am. Dec. 57. See, too, *Picket v. Garrison*, 76 Iowa, 347, 14 Am. St. Rep. 220.

AYE v. PHILADELPHIA COMPANY.

[193 PENNSYLVANIA STATE, 451.]

LANDLORD AND TENANT—ASSIGNEE OF LEASE—NOTICE.—If a subsequent lease refers to a former one, an assignee of the subsequent takes with notice of the prior lease.

LANDLORD AND TENANT—LEASE OF OIL LANDS—CONSTRUCTION.—If the parties to a lease of oil lands provide for a test well and what shall be done in case it produces oil in paying quantities, but make no provision what shall be done in case the well proves dry, there is an implied obligation on the part of the lessee, if the test well proves dry, to proceed with the exploration and development of the land with reasonable diligence, according to the usual course of business, and a failure to do so amounts to an abandonment which will sustain a re-entry by the lessor.

LANDLORD AND TENANT—OIL LEASES.—The rule in regard to contracts that where the parties have expressly agreed on what shall be done, there is no room for the implication of anything not so stipulated for, is equally applicable to oil and gas leases as to other contracts.

LEASE—ABANDONMENT OF.—Whether a lessee has abandoned his lease, so as to entitle the lessor to re-enter, is a question of fact to be determined by the jury from the acts, declarations, and intentions of the parties.

W. Scott, O. Buffington, J. Dalzell, and G. B. Gordon, for the appellant.

M. F. Leason, W. D. Patton, J. B. Neal, and J. H. Painter, for the appellees.

⁴⁵⁴ MITCHELL, J. The lease to Aye and Martin being referred to in the lease from Campbell to Bailey, the appellant, as assignee of Bailey, must be held to have taken with notice. The recital of the prior lease, however, was not an affirmation by Campbell of its continuing validity, but a disclaimer by him of responsibility ⁴⁵⁵ on that subject. It was a refusal to declare or enforce a forfeiture himself, but a transfer of his right in that regard, whatever it might turn out to be, to appellant, which assumed the risk. Its entry and commencement of operations on the land were an enforcement of a forfeiture for abandonment if Campbell had that right. This depends on the circumstances.

By their lease from Campbell the appellees covenanted to complete a test well in the vicinity within six months, and, if oil should be found in paying quantities, to complete a well on the leased premises within the next six months or pay a yearly rental per acre for the delay. The royalty reserved as rent by the lessor was one-eighth of the oil produced. The

lease was made July 11, 1887. The test well was put down on a farm in the vicinity, but produced no oil. A second well was drilled on another farm with like result, and operations then ceased without any well on the leased premises. On October 2, 1891, Campbell leased to Bailey and on June 19, 1892, Bailey assigned his lease to the appellant.

The lease from Campbell to appellees, it will be seen, contained express covenants what the lessees should do in a certain event, but made no provision for the contingency of the test well proving dry, which is what actually happened. In such case it becomes necessary to inquire what covenants, if any, are implied.

It was held as far back as *Watson v. O'Hern*, 6 Watts, 362, that a lease of a stone quarry in consideration that the lessee shall pay a certain price per perch for all stone taken out, though called by the parties a "privilege and liberty," is a contract by the lessee that the quarry shall be worked, and failure to do so is an actionable breach. The rule is thus stated by the present chief justice in *Koch's Appeal*, 93 Pa. St. 434, 442: "Where a right to mine iron ore or other minerals is granted in consideration of the reservation of a certain proportion of the product to the grantor, the law implies a covenant on the part of the grantee to work the mine in a proper manner and with reasonable diligence, so that the grantor may receive the compensation or income which both parties must have had in contemplation when the agreement was entered into." So, in *Ray v. Western etc. Natural Gas Co.*, 138 Pa. St. 576, 589, 21 Am. St. Rep. 922, it was said by our late brother Clark: "Whilst the obligation on the part of the ⁴⁵⁶ lessee to operate is not expressed in so many words, it arises by necessary implication. . . . If a farm is leased for farming purposes, the lessee to deliver to the lessor a share of the crops, in the nature of rent, it would be absurd to say, because there was no express engagement to farm, that the lessee was under no obligation to cultivate the land; an engagement to farm in a proper manner, and to a reasonable extent, is necessarily implied." That was the case of an oil and gas lease, and it has been said that the doctrine is peculiarly applicable to such leases, owing to the nature of the product: *McKnight v. Manufacturers' Natural Gas Co.*, 146 Pa. St. 185, 28 Am. St. Rep. 790; *Venture Oil Co. v. Fretts*, 152 Pa. St. 451.

The rule in regard to contracts is that where the parties have expressly agreed on what shall be done there is no room for the

implication of anything not so stipulated for, and this rule is equally applicable to oil and gas leases as to other contracts. There is nothing peculiar about them in this respect. But here the parties have provided for a test well, and for what shall be done if it produces oil in paying quantities. But the other contingency, that it prove dry, is not provided for, and it is the omitted case that has occurred. The authorities are uniform that under such circumstances there is an implied obligation on the lessee to proceed with the exploration and development of the land, with reasonable diligence, according to the usual course of the business, and a failure to do so amounts to an abandonment which will sustain a re-entry by the lessor.

Abandonment is a question of fact to be determined by the acts and intentions of the parties. An unexplained cessation of operations for the period involved in this case gives rise to a fair presumption of abandonment, and, standing alone and admitted, would justify the court in declaring an abandonment as matter of law. But it may be capable of explanation, and is, therefore, usually a question for the jury on the evidence of the acts and declarations of the parties: *Stage v. Boyer*, 183 Pa. St. 560. It should have been so left to them in this case.

Judgment reversed and venire de novo awarded.

LEASE OF OIL LANDS—OBLIGATIONS OF LESSEE.—A lease of land for oil purposes imposes on the lessee the duty to test thoroughly the existence of oil in the rocks that should bear it, and, if oil is found, to sink as many wells as may be necessary to secure so much of the oil from the land demised as may be obtained with profit: *McKnight v. Manufacturers' Natural Gas Co.*, 146 Pa. St. 185, 28 Am. St. Rep. 790.

COOK v. FORKER.

[193 PENNSYLVANIA STATE, 461.]

CONTRACTS MADE ON SUNDAY—RATIFICATION.—If a note is discounted on Sunday and a check given for the proceeds thereof and indorsed on the same day, but not drawn until a following and legal day, the transaction is thereby ratified and affirmed as a whole, and constitutes a legal and binding loan of the money.

CONTRACTS MADE ON SUNDAY—RATIFICATION.—Contracts made on Sunday are not void in the sense that they do not admit of ratification, though so long as they are executory their enforcement must be refused. Acts of ratification make them new contracts, which the parties are bound to perform.

CHECKS — INDORSEMENT — LIABILITY.—If a check is drawn to the order of a person and indorsed by him, it is no defense to an action for money had and received on such check that he did not receive the money personally, but merely as an agent for another.

USURY—PURCHASE OF NOTE.—If a bank discounts a note for an indorser who is neither the maker nor the payee, it may pay any agreed rate for the note, and the transaction is legal and not usurious.

NEGOTIABLE INSTRUMENTS—WANT OF NOTICE OF PROTEST.—To constitute want of notice of protest of a note a defense, it must be alleged that notice of protest was not sent, as well as that it was not received.

J. T. Maffett, for the appellants.

H. R. Wilson and C. Z. Gordon, for the appellee.

⁴⁶⁷ MITCHELL, J. The original statement on the promissory notes having been amended, the only form of the action with which we are concerned is for money had and received.

Certain notes of one Weston were discounted by plaintiffs on ⁴⁶⁸ Sunday, and a check for the proceeds given by plaintiffs to defendant on the same day, but dated as of the day following. The defendant indorsed the check on the Sunday it was given, but the money was drawn on it by the indorsees on the following Wednesday. This is the money had and received which is the cause of action declared upon in the amended statement. The court properly held that there could be no recovery on the note, but the action for the money stands on different ground. As to it the contract was not complete or executed on Sunday. Its object on the part of the defendant was to obtain the money on the discounted notes before their maturity, and it was not carried out until the money was obtained. The check in the meantime was merely a part of the incomplete Sunday agree-

ment, and as such either party could have refused to go further with it. But, when the holder presented and the plaintiff paid it, both parties ratified and reaffirmed the transaction with all its consequences. This was done on a legal day, and made a legal and binding loan of the money. The weight of the authorities is to this effect: *Daniel on Negotiable Instruments*, sec. 69; *Adams v. Gay*, 19 Vt. 358.

Contracts made on Sunday are not void in the sense that they do not admit of ratification, though so long as they are executory the law will refuse to enforce them: *Chestnut v. Harbaugh*, 78 Pa. St. 473; and acts of ratification will make them new contracts which parties will be bound to perform: *Uhler v. Applegate*, 26 Pa. St. 140. It was accordingly held in the latter case that an agreement made on Sunday to extend the time of payment of a note, in consideration of the anticipation of part of the amount, became binding by the agreed prepayment on a legal day, Chief Justice Lewis saying: "It is not the intention of the law that its regard for the Sabbath day shall be made the means of perpetrating a fraud." So in *Whitmire v. Montgomery*, 165 Pa. St. 253, a note made and delivered on Sunday was held to be ratified and made good by a subsequent payment of interest on it.

The other grounds of defense set out in the affidavits are equally insufficient. Defendant avers that the notes were not discounted for him, and that he received no part of the proceeds of the check. But the check was drawn to his order and indorsed by him. Payment to his order was payment to him. 460 If he had drawn the money himself and sent it to his principals, he could not have denied the receipt of the money, and what he did was the same in substance and effect. The fact that he was acting as agent for other parties, and was so known by the plaintiffs, is not inconsistent with his assumption of individual liability. His indorsement of the notes and the check imported such liability, which could not be contradicted by mere assertion of agency (*Ziegler v. McFarland*, 147 Pa. St. 607), and there is no other denial.

The discount of the notes at the rate of ten per cent per annum was not usurious. They were the notes of one Weston discounted by plaintiffs for defendant, or, in the extreme view, for his principals, the Pittsburgh Vehicle and Harness Company. Under such circumstances a banker may purchase the notes at any agreed rate: *Gaul v. Willis*, 26 Pa. St. 259; *Moore v. Baird*, 30 Pa. St. 138.

The allegation that no notice of protest was received was not sufficient. The rule of commercial law in such cases is the exception in which the requirement is, not that notice shall be received, but only that it shall be sent: *Weakly v. Bell*, 9 Watts, 273, 279, 36 Am. Dec. 116; *Daniel on Negotiable Instruments*, sec. 1021. The proper form of affidavit is, therefore, that the defendant is informed, believes, and expects to be able to prove that no notice was sent, and, even if not in that form, it should at least in substance lay ground for inference that none was sent.

The affidavits were insufficient, and judgment should have been entered for plaintiffs.

Order refusing judgment reversed, and judgment directed to be entered for plaintiffs unless other legal or equitable ground be shown why such judgment should not be entered.

NOTE MADE ON SUNDAY—RATIFICATION.—Although a note executed on Sunday is void, a payment made on it on a secular day will be regarded as a ratification, and will make it valid from that day: *Russell v. Murdock*, 79 Iowa, 101, 18 Am. St. Rep. 348. See, on this subject, the extended notes to *Allen v. Duffie*, 38 Am. Rep. 166, 167; *Coleman v. Henderson*, 12 Am. Dec. 292. See, also, *Roberts v. Barnes*, 127 Mo. 405, 48 Am. St. Rep. 640, and note.

USURY.—A NOTE SOLD AT A GREATER DISCOUNT than the legal interest does not thereby become usurious if the payee has received it in a business transaction: *Ramsey v. Clark*, 4 Humph. 244, 40 Am. Dec. 645; *Joy v. Diefendorf*, 130 N. Y. 6, 27 Am. St. Rep. 484. But see *Youngblood v. Birmingham Trust etc. Co.*, 95 Ala. 521, 36 Am. St. Rep. 245; *Second Nat. Bank v. Morgan*, 165 Pa. St. 199, 44 Am. St. Rep. 652.

NEGOTIABLE INSTRUMENTS.—NOTICE OF DISHONOR of commercial paper put into the postoffice is sufficient, though never delivered: *Shedd v. Brett*, 1 Pick. 401, 11 Am. Dec. 209; *Walker v. Steson*, 14 Ohio St. 89, 84 Am. Dec. 362; *Ellis v. Commercial Bank*, 7 How. 294, 40 Am. Dec. 63. See, too, *Jensen v. McCorkell*, 154 Pa. St. 323, 35 Am. St. Rep. 843.

STIGERS v. DINSMORE.

[193 PENNSYLVANIA STATE, 482.]

WILLS—DEVISE IN FEE.—A will devising the use of a farm to "C. during his life, and to his heirs to the third generation the same use; then the property to be sold and divided equal among the heirs of C.," evinces an intention on the part of the testator that the property should go to C. and his heirs, and C. takes the estate in fee.

B. F. Shively and A. J. Truitt, for the appellant.

C. Z. Gordon and H. I. Wilson, for the appellee.

⁴⁸⁵ **MITCHELL, J.** The testator devised "the use to my oldest son, Charles W. Stigers, during his life, and to his heirs to the third generation the same use, then the property to be sold and divided equal among the heirs of Charles W. Stigers, . . . the farm," etc. Notwithstanding the awkwardness of the wording, the testator's intent is perfectly clear to give the farm to Charles and his heirs. No other beneficiary is mentioned, and it is plain that the omission is not accidental, but because the testator's intent did not contemplate that there should be room for any other. The devise is to Charles and his heirs, and after the third generation there is to be a distribution to his heirs. Whether the phrase "then the property to be sold and divided equal" means that the land is to be sold "or" divided, or that it be sold and the "proceeds" divided, is not material. The intent was to give the rem in one form or the other to Charles and his heirs, and this carried a fee.

The restriction to the third generation was merely an attempted restraint on alienation for that period. This is clear enough from the general tenor of the will, but the effort to continue the testator's control after his death is seen also in the direction that Charles "is to farm the same as I have farmed," and among the personal property given the blacksmith's tools are "to be used in shop," and the old clock "to stand where it now stands."

The fact that the testator in terms gave only "the use" of ⁴⁸⁶ the farm does not prevent the gift being a fee, where that was his intent: *Armstrong v. Michener*, 160 Pa. St. 21.

Judgment affirmed.

WILLS—RULE IN SHELLEY'S CASE.—A devise to one "to be for his use during his life, and then to fall to his heirs," is within the rule in *Shelley's case*: *Extended note to Polk v. Faris*, 30 Am.

Dec. 416. See the monographic note to *Carpenter v. Olinder*, 11 Am. St. Rep. 100-107, discussing the rule in *Shelley's* case as applied to devises; also, *Westcott v. Binford*, 104 Iowa, 645, 65 Am. St. Rep. 530.

GOODWIN v. McMINN.

[193 PENNSYLVANIA STATE, 646.]

TRUSTS AND TRUSTEES—TRUSTEE EX MALEFICIO.—A creditor who receives a conveyance from his debtor of land worth an amount in excess of his debt, upon an express oral promise to reconvey when his debt is discharged, and then, after satisfying his debt out of the proceeds of a sale of part of the land, refuses to reconvey the remainder, is guilty of fraud, and becomes a trustee ex maleficio to the debtor, or to a person who purchases under an execution against the debtor, and the purchaser may maintain a bill in equity to compel a reconveyance.

J. Inghram and J. S. Carter, for the appellant.

A. F. Silveus, S. M. Smith, and R. F. Donney, for the appellee.

647 DEAN, J. Alva C. Shaw was a merchant doing business in Jefferson borough, Greene county. He became embarrassed financially. McMinn, this defendant, and Jacob Haver were his sureties on two notes, each in sum of two hundred dollars. McMinn was also his surety on other notes. Shaw owned a small farm and four houses and lots near Jefferson. To pay himself as surety on the notes McMinn induced Shaw to convey to him all of his property. The deeds on their face were absolute. McMinn sold, excluding a house and lot on Washington street, more than sufficient ⁶⁴⁸ to pay his liabilities for Shaw in full. John McGovern, who was also surety for Shaw and paid the debt, brought suit and recovered judgment, issued execution, and levied upon the Washington street lot. All Shaw's interest was sold and purchased at sheriff's sale by Goodwin, this plaintiff, and deed duly acknowledged. The consideration was one thousand dollars. Goodwin then brought this bill, praying that the deed from Shaw to McMinn for this particular property be declared void, and that McMinn be directed to deliver it up for cancellation, on the ground, as set forth in the bill, that the deed for the several tracts had been made on the express understanding and agreement between Shaw and McMinn to reimburse McMinn in his liability

for Shaw's debts, and the agreement of McMinn to reconvey the property to Shaw if he did not have to pay the debts, or such part of the property as was not necessary to that end; that in fact at the very time the deed was made, McMinn had already in his hands, of Shaw's money, a large part of the sum necessary to relieve him from loss, and soon afterward received much more than sufficient to discharge any contingent liability on part of Shaw to him. Nevertheless McMinn fraudulently refused to reconvey the property to Shaw, in violation of his agreement. The plaintiff, being the purchaser of Shaw's interest in the land at sheriff's sale, claimed that he stood in the place of Shaw, with the right to assert his title.

The defendant demurred to the bill for the reason that, as the possession of defendant under a legal title was conceded, an assertion of plaintiff's right must be at law in ejectment, which would be a full and adequate remedy, and that in fact the records of the court of common pleas exhibited an ejectment between the same parties then pending; further, that the bill is in substance an ejectment bill and should be dismissed.

The court below, being of opinion that on the facts set out and on the terms of the parol agreement between Shaw and McMinn the plaintiff in effect sought to turn the deed, absolute on its face, into a mortgage, by setting up a parol unrecorded defeasance, held that the act of June 8, 1881, was an effectual bar to a decree in plaintiff's favor; because that act declared that no defeasance to any deed absolute on its face should have the effect of reducing it to a mortgage unless the defeasance ⁶⁴⁹ was in writing, delivered to the grantor, and recorded within sixty days from the execution of the deed. The court therefore sustained the demurrer and dismissed the bill. From that decree we have this appeal.

It seems to us the court below misapprehended the substance of plaintiff's bill. He did not set up an agreement as a defeasance to the deed, and which had the effect of changing its absolute character into a conditional one, for the security of a debt or a contingent future liability. The allegation was that the deed was procured by fraud, in that at the time it was given a large part of McMinn's liability had already been discharged by money then in his hands, and this unknown to Shaw; and further, that a fraudulent use was being made of the conveyance, in that while given to relieve McMinn of loss on account of his suretyship, yet when that obligation was wholly

discharged by the sale of the other property he refused to reconvey this particular property to Shaw or the vendee at sheriff's sale. We take the fact averred, which technically the demurrer admits, that the conveyance was for the payment of a debt which was paid by the grantee from other sales and other money, and then the unsold property was to be reconveyed to the grantor; and that the conveyance was upon a special trust and confidence reposed by the grantor in the grantee. This, plainly, upon the refusal of the grantee to reconvey after the purpose of the conveyance had been accomplished, put the latter in the situation of a trustee *ex maleficio*, of which trust a court of equity will take jurisdiction. While the legal title and possession remain in the grantee, it is difficult, if not impossible, to reach the equity of the case in an action at law. The refusal to reconvey is a palpable fraud, not only upon the grantor, but indirectly upon other creditors than defendant. He obtains by solicitation from the debtor property worth three times his own debt, upon an express promise to reconvey when his own liability is discharged, and then, after selling part of the property, deliberately violates his promise. This is a manifest fraud; the transaction leaves the legal title in the wrongdoer, but the equitable is clearly in the grantor; that equitable title passes by the sheriff's sale to this plaintiff; he stands in Shaw's shoes. A trust is where the legal estate is in one and the equitable estate in another. If the intention of McMinn, as averred, is to ⁶⁵⁰ convert the property to his own use, when nothing remains in him but the naked legal title, without a spark of beneficial interest, it is a fraud upon Shaw, and a chancellor must direct a reconveyance to him in whom is the complete equitable interest. "In all cases of fraud and where transactions have been carried on *mala fide* there is a resulting trust by operation of law; but unless there be something in the transaction more than is implied from the violation of a parol agreement equity will not decree the purchaser to be a trustee": *McCulloch v. Cowher*, 5 Watts & S. 427. As is said by Agnew, J., in *Seichrist's Appeal*, 66 Pa. St. 237: "We are of opinion this case falls within the proviso to the fourth section of the act of 1856, that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall arise by implication or construction of law, such trust or confidence shall be of like force and effect as if the act had not been passed. Among the trusts thus resulting from the operation of law are those arising from the fraud of him who has the title. Although no one can be

compelled to part with his own title by force of a mere verbal bargain, yet when he procures a title from another which he could not have obtained except by a confidence reposed in him, the case is different. There, if he abuse the confidence reposed in him, he is converted into a trustee *ex maleficio*. The statute which was intended to prevent frauds turns against him as the perpetrator of a fraud. It is not, therefore, the fact that the bargain by which he obtained the title is verbal that governs the case, but the fact that he procured the title to be made to him in confidence, the breach of which is fraudulent and in bad faith." These principles cover the whole ground set out in the averments of this bill.

As to the act of 1881 which declares a defeasance to an absolute deed must be in writing and be recorded, the provisions of the act have no application here. The parol agreement does not turn the absolute deed into a mortgage. It was absolute on its face, and intended so to be, that McMinn might with facility sell and convey the land for the payment of Shaw's debt; when that end was reached, McMinn's title ended, and Shaw was entitled to a reconveyance of what was not appropriated under the agreement. It was not a deed which was to become absolute upon a condition subsequent, the failure of ⁶⁵¹ Shaw to pay McMinn's debt. It constituted itself payment of the debt. The sales by McMinn were to determine whether the property was sufficient or whether it exceeded in value the debts.

We pass no opinion on the truth of the averments; they must be sustained by evidence which is clear and precise. All we say is that plaintiff is entitled to a hearing.

The demurrer is overruled, the bill reinstated, and defendant is ordered to answer over.

A TRUST EX MALEFICIO ARISES WHENEVER a person acquires title to property by means of an intentional false or fraudulent verbal promise to hold the same for a certain specific purpose; as, for example, to convey it to another or to reconvey it to the grantor, and having thus obtained the title, retains and claims the property as his own: *Larmon v. Knight*, 140 Ill. 232, 33 Am. St. Rep. 229, and note. See, also, *Rollins v. Mitchell*, 52 Minn. 41, 33 Am. St. Rep. 519.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

STATE v. SUMNER.

[55 SOUTH CAROLINA, 32.]

**CRIMINAL LAW.—AN INSTRUCTION THAT “A REASON-
ABLE DOUBT** is a strong doubt based on the testimony,” is correct.

HOMICIDE — MANSLAUGHTER—PROVOCATION.—Where one provokes a fight for the sole purpose of killing the one provoked under circumstances which might appear to be sudden and unexpected, and then kills, it is murder, and not manslaughter.

MANSLAUGHTER—COOLING TIME—OPINION OF JUDGE.
AN INSTRUCTION relating to killing under sudden heat and passion without time to cool, which uses the words “because some people don’t cool, and some don’t want to cool,” does not convey to the jury the impressions of the judge upon the testimony, where the charge is general and does not mention, directly or indirectly, any part of the testimony.

HOMICIDE—SELF-DEFENSE.—If there is any reasonable, safe way to escape, a person ought to do it, and not take the life of his fellow-man.

APPEAL—INSTRUCTIONS.—IT IS NOT PREJUDICIAL ERROR for a judge, in an instruction, to refer to issues based upon the arguments and the indictment, where he disowns any reference to the testimony.

WITNESSES—TESTIFYING AFTER BEING SWORN.—If the testimony of a witness is incompetent from any legal cause, he may be prevented from testifying, even after he has been called and sworn.

WITNESSES—CROSS-EXAMINATION.—A witness cannot be contradicted on a collateral issue brought out on cross-examination, even for the purpose of impeaching the witness.

WITNESSES — SURREBUTTAL—CHARACTER. — Where a witness testifies for the first time in rebuttal, the admission of testimony in surrebuttal attacking the character of such witness is within the discretion of the trial judge.

Johnstone and Welch & Wingard, for the appellant.

Solicitor Thurmond and Efird & Dreher, for the appellee.

³³ POPE, J. The defendant having been convicted of murder, with a recommendation to mercy, and having been duly sentenced, now appeals from the judgment of the court. We will now pass upon these grounds of appeal, eleven in number, in their order:

"1. Because his honor, the presiding judge, erred in charging the jury as follows: 'A reasonable doubt is a strong doubt based on the testimony.'" The language of the presiding judge in this connection was: "The state is bound to make out its case beyond a reasonable doubt; that is, before you can convict, you must be satisfied beyond a reasonable doubt that the defendant is guilty; beyond a reasonable doubt—remember the words. If there is a reasonable doubt in the mind of any juror, you cannot convict; that is the rule that governs the state. A reasonable doubt is a strong doubt based on the testimony, not on some imaginary matter outside." This court, in the case of *State v. Coleman*, 20 S. C. 455, used this language: "We know of no law or practice which would permit this court to hold a circuit judge in error for charging a jury . . . or for instructing them that the phrase, 'a reasonable doubt,' used in the books, means a 'serious, well-founded substantial doubt.'" And in the case of *State v. Senn*, 32 S. C. 404, this court said: "It cannot be necessary to do more than repeat what this court said in *State v. Coleman*, 20 S. C. 455, that we know of no law or practice which would permit us to hold a circuit judge in error for instructing a jury that the phrase 'reasonable doubt,' used in the books, means a serious, well-founded, substantial doubt." Substitute the word "strong" ³⁴ for that of "serious," and the cases are identical. This exception, upon the authority of the cases just cited, must be overruled.

"2. Because the presiding judge erred in charging the jury as follows: "The law would say you cannot place your enemy, antagonist, or fellow-being, can't surround him, with such circumstances which you know he would resent, and then mention it to him, bring it up to him to make him fight, just to get to kill him under circumstances which might appear to be sudden and unexpected; the law says you cannot do that.'" While the circuit judge was discussing the crime of manslaughter, after a very careful delineation of the principles of the law

governing this phase of homicide, he, rather by way of summing up the law, said: "You see, then, manslaughter is killing without malice; but if the killing was done under circumstances which showed that previous criminal intention existed to bring about the fight and to get to kill his assailant, the law would say that was murder, you brought that about," and then immediately follows the language embodied in this exception. And the charge of the judge on this point has this language as a part of the paragraph of his charge set out in this exception: "If, although the fight might be sudden, yet if it appears there was a predetermination on the part of the slayer to bring it about, then if he kills, it is murder and not manslaughter." The language of the charge sets forth sound, wholesome law so clearly that the jury was obliged to see its force, and, too, it was not subject to any legal objection by the defendant. This exception is overruled.

"3. Because in charging the jury with respect to manslaughter as being a killing under sudden heat and passion, upon sufficient legal provocation and without time to cool, the presiding judge in using this language, 'because some people don't cool, and some don't want to cool,' conveyed to the jury the impression made upon his honor's mind by the testimony in the case, and thereby committed an error of law." We cannot agree with ³⁵ the appellant in this exception to the charge of the presiding judge; the language set out in this exception is only a part of what the judge charged in this connection. By reference to the charge we see the judge was most earnestly endeavoring to bring home to the minds of the jury what manslaughter was. Amongst other things he said: "Manslaughter is the unlawful killing of a human being in sudden heat and passion upon sufficient legal provocation. Sufficient for what? Sufficient to create that sudden heat and passion; then you say, To what extent does the sudden heat and passion go? It must go to that extent that the reason is partially or entirely dethroned, the man is not himself, and if he kills then, for that provocation and not for some past provocation, if he slays his fellow-being just then for that provocation, and not to punish him for something else gone before, and while in that heat and passion, and before he cooled or had time to cool, because some people don't cool and some people don't want to cool; therefore, the law says if there is legal provocation, and it is sufficient to create such a great heat and passion that reason is partially or entirely dethroned, the man is not himself, and

he slays his fellow-man before he cooled or had time to cool—and you must be the judges of that—and for that provocation, then the law says, ‘I am so mindful of the weakness of human nature that I will not call such killing as that murder, I will call it manslaughter.’” We are unable to see how the language used could prejudice the minds of the jurors against the prisoner. The constitution requires the circuit judge to declare the law. In doing so he cannot state the testimony. The circuit judge did not mention, directly or indirectly, any part of the testimony. He has declared the law faithfully. The exception is overruled.

“4. Because the presiding judge erred in charging the jury as follows: ‘If there is any reasonable, safe way to escape, the law says he [the defendant] ought to do it, and not take the life of his fellow-man.’” The extract is part of a paragraph of the charge. The circuit judge ³⁶ had analyzed the defense and showed in what it consisted. Near the close of the analysis of the law, he said: “The right of self-defense is recognized by the law; a man’s duty is to defend himself; and he is not bound to endanger himself by retreating, but if there is any reasonable safe way of escape, the law says he ought to do that, and not take the life of his fellow-man. I don’t mean by that he has got to go away from the place because his adversary is there—he is not bound to turn out of his way; but after the immediate conflict is commenced, it is his duty to retreat from it, avoid taking a man’s life, to retire if he can do so safely, but not bound to do so otherwise, because he has the right to defend himself.” We must overrule this exception: See *State v. Trammell*, 40 S. C. 331, 42 Am. St. Rep. 874.

“5. Because the presiding judge erred in charging the jury upon the facts, as follows: ‘You must consider that matter, consider the meeting of these parties,’ thereby intimating to the jury the conclusion of his honor that these parties did meet, and that a matter did take place between them.” In his charge to the jury, the presiding judge did say: “You must consider the matter, consider the meeting of these parties. It is claimed they met and had a fight; I cannot say they had a fight—I cannot say they had any trouble at all. It is claimed by the state there was trouble—I gather from the argument and indictment there was trouble. I cannot allude to the testimony. Now under what circumstances did they meet?” We do not understand from the trend of the prose-

cution or defense, as developed in the "case for appeal," that there was any difficulty as to the time or place of the meeting of the accused and the deceased on the fateful Sunday afternoon when the tragedy occurred. While the provision of the constitution is mandatory upon circuit judges, wherein stating the testimony by them is forbidden, yet there must be some occasion for the provision of the constitution to apply, before we can speak in condemnation. Here the circuit judge disowns any reference to the testimony as the ³⁷ basis of his remark to the jury which is complained of. On the contrary, he speaks of it as based upon the arguments and the indictment. If error, it was harmless. The fifth exception is overruled.

"6. Because the presiding judge erred in overruling the defendant's objection, and holding as competent and relevant the testimony of the witness, J. H. Shell, detailing certain declarations of the deceased, in regard to the fight, made in the absence of the defendant." This exception must be overruled, for it is founded on an unintentional oversight by the appellant of the testimony of the witness, Shell: "Witness.—Mr. Murdock come to me and submitted himself. Mr. Johnstone.—In the absence of this defendant, it is not competent, cannot bind this defendant. Solicitor.—We are not proving statements; but we can prove whether he surrendered himself, and what— The Court.—You can prove what he did, but not what he said. Witness.—He did surrender himself to me." The "case" for appeal discloses that the counsel for the appellant had brought out in the cross-examination of this witness, Shell, that the deceased had had, on the day before he was killed, a difficulty with two brothers of the accused, and the witness, being the intendent of the town of Peak, where both difficulties took place, was questioned very closely as to his reasons for not arresting the deceased on Saturday, when the first difficulty took place. The solicitor was anxious, therefore, to show that Murdock, the deceased, one-half hour before he was killed, had surrendered himself to the intendant for the difficulty which had occurred on Saturday. We see no error here, and the exception is overruled.

We now come to the seventh, eighth, ninth, and tenth exceptions, and we will consider them in a group. "7. Because the presiding judge erred in excluding the testimony of Mrs. Moss, offered by the defendant to impeach the character and credibility of certain witnesses in behalf of the state, who, for the first time,

testified in reply. 8. Because the presiding judge erred in not ruling that the objection to the right to ³⁸ introduce Mrs. Moss as a witness came too late, the objection not having been raised until after said witness had been offered for defense and accepted by the court, sworn and partially examined. 9. Because the presiding judge erred in not ruling that the solicitor, in failing to raise the objection to the introduction of Mrs. Moss as a witness at the time this witness was offered by the defendant, and before she was sworn, had waived the right to object to the witness testifying. 10. Because the presiding judge erred in excluding Mrs. Moss as a witness after she had been sworn and partially examined." In order that we may understand how this matter covered by these exceptions arises, it will be better to copy herein what occurred in the circuit court when the question was presented. After the state closed its reply, the defense introduced and swore Mrs. Moss, when the following took place: "Mr. Johnstone.—Mrs. Moss will please take the stand. Mrs. Moss, sworn, says: By Mr. Johnstone.—You are the mother of Mrs. Murdock? A. Yes, sir. Q. Do you remember on one occasion when her child— Mr. Efird (interrupting).—You have no right to put up that witness. Mr. Johnstone.—They waived that by not objecting before she was sworn. I had asked the question whether or not she was the mother of Mrs. Murdock, and she has answered it. The Court.—I looked for objection to be made before she was sworn. Mr. Efird.—They have no right to put up further testimony. Mr. Johnstone.—That objection, if tenable, should have been made before the swearing of the witness; having sworn the witness, the only objection they can raise now is as to the legitimacy of the question. Mr. Efird.—Our objection takes in the whole matter—the right to put the witness up and to the questions. Argued. During the argument Mr. Johnstone said: We wish to examine this witness as to the character and veracity of their witness, Willis M. Wilson, whom they introduced as a witness in this case for the first time in reply. Objection sustained. Exception noted." We would not like to commit the court to the view embodied in the eighth ³⁹ exception. No doubt the state's attorneys ought to have made their objection to the witness before she was sworn. Still, if the testimony of such witness from any legal cause was incompetent, the witness might be prevented from testifying. It is not uncommon for the testimony of a witness to be ordered struck from the stenographer's notes. If that be so, we cannot see why an error com-

mitted in allowing a witness to be sworn might not be corrected. And for the same reasoning we cannot sanction the tenth exception.

It remains for us to examine with some care the seventh exception, because it presents a nice question of law, and the practice of our courts thereunder. In the appeal at bar, the "case" discloses the fact that the defendant sought to justify the alleged killing by him of one Murdock, by showing by a number of witnesses that he was a violent, turbulent, ill-grained, dangerous man, and these facts were well known in the community in which he lived, and were well known by the defendant. Hence, when the state made reply, pains were taken to do away with the effect of the testimony of the defense on this point, not by attacking the general character of defendant's witnesses, but by having the wife of the deceased to testify as to the conduct of her husband toward herself, and also by having the witness, S. T. Swygert, who was re-examined, and the new witnesses, O. P. Clark, J. B. M. Stuck, and Willis M. Wilson, to testify to the general reputation for peace and order of Murdock, the deceased, in his lifetime. It will be seen, therefore, that the defendant never had any means of attacking the testimony of these new witnesses as to their general character. When the state announced that it had closed in reply, the defendant called a new witness, a Mrs. Moss, to the stand as a witness. She was sworn and was proceeding, we must assume, to contradict Mrs. Murdock's testimony as to the gentleness of her deceased husband to herself, when the objection was presented that the defendant had no right to introduce testimony in surrebuttal. Defendant's counsel ⁴⁰ announced to his honor, the circuit judge, that his purpose was to contradict the state's new witness, Willis M. Wilson, by proof of general bad character. The circuit judge denied the defendant the right to this testimony. There can be no doubt, under our decision of *Farr v. Thompson*, Cheves, 37, *Chapman v. Cooley*, 12 Rich. 654, and *State v. Jones*, 29 S. C. 230, that in case the witnesses for the state or the plaintiff should be attacked by the defendant because wanting good general character, new testimony might be offered by the state in reply. But if the plaintiff, or the prosecution in a criminal case, sought in the reply to defendant's testimony to break down the general character of defendant's witnesses, that in such an event the defendant could introduce testimony to rebut, or in surrebuttal, to speak more accurately. This position in the eye of the law is deemed but

an act of duty owed to such witnesses so attacked. Not only so, but we find in the case of *McCoy v. Phillips*, 4 Rich. 464, this language in the report of the case by the judge on circuit: "After defendants had closed their testimony, plaintiff offered in evidence a grant of land, obtained since the commencement of the suit (not the range in dispute), to show that there was vacant on the swamp to that extent. The defendants objected to it, as not strictly in reply, but it was admitted; and the defendants were allowed and gave evidence in reply to it." On appeal, the ruling of the circuit judge was sustained. In the eighth volume of *Encyclopedia of Pleading and Practice*, at page 133, it is said: "Evidence in surrebuttal.—The case at first made out by the plaintiff should apprise the defendant of the ground upon which the cause of action is finally to rest. Accordingly, if the plaintiff in reply puts new matter in evidence, or makes a new case different from that at first made out, it becomes the right of the defendant to call witnesses in surrebuttal." See authorities cited in note 3 on page 133 of the same work—especially the case of *Asay v. Hay*, 89 Pa. St. 77, where Trunkey, J., said: "After the defense closed, the plaintiff called Dr. Thomas Hay, who testified to the defendant's ⁴¹ admissions of indebtedness on the note in suit. That this testimony is pertinent and material is conceded. The defendant offered to rebut it with his own testimony." The court of last resort in Pennsylvania decided that the testimony of defendant should have been allowed, saying among other things: "Had it been competent for the defendant to prove in chief what he offered in rebuttal, the court might have refused the re-examination of the witness. As to matters that require explanation, or as to new matters introduced by the opposing interest, a party has a right, in rebuttal, to re-examine his witnesses." In the case at bar, Mrs. Murdock, and especially Willis M. Wilson, were new witnesses introduced for the first time in reply. In a capital case, is it to be said that a defendant cannot attack the character for veracity of witnesses who may be swearing his life away with perfect impunity? If the reputation of a witness is so precious in the eyes of the law, that where he has testified for the defendant, and the state attempts to blacken or blast his general character, by testimony in reply, the law allows him, in surrebuttal, to introduce testimony in favor of his character, why does not the life or liberty of the defendant, when new witnesses for the first time offered in reply, appeal for, and demand, that the want of general character for

uprightness shall be shown? We think the circuit judge erred here. Especially as his exclusion of the testimony was not based upon the exercise by him of discretion, but, on the contrary, the exclusion seemed to be made by the circuit judge upon the absence of power in him to admit it.

As to the eleventh exception, it cannot prevail, for the reasons assigned in the review of the eighth exception. Therefore, in my opinion the judgment of this court should be: It is the judgment of this court that the judgment of the circuit court be reversed, and that the cause be remanded to the circuit court for a new trial. But the majority of the court think otherwise. The judgment of the court is that the judgment of the circuit court be affirmed.

⁴² JONES, J., concurred in the opinion of the chief justice, that the judgment of the circuit court should be affirmed.

GARY, J., dissented, and concurred in the dissenting opinion of Mr. Chief Justice McIver.

McIVER, C. J., dissenting. While I concur in all the conclusions reached by Mr. Justice Pope in his opinion, except the last, I cannot concur in that, as I do not think there was any error of law on the part of the circuit judge in excluding the testimony of Mrs. Moss offered by the defendant, after the state had closed its testimony in reply, for the purpose of impeaching "the character and credibility of certain witnesses," who had, for the first time, testified for the state in reply. It seems that the defendant, in offering his testimony, introduced witnesses who impeached the character of the deceased for violence, and testified "as well to individual acts of violence within their personal knowledge and the personal knowledge of the defendant, Charles C. Summer," and the state, in reply, offered five witnesses to rebut that testimony. One of the witnesses offered by the state, in reply, was Willis M. Wilson, who testified only as to the good character of deceased. Another witness was Mrs. Murdock, the wife of the deceased, who denied two acts of violence, which seems to have been charged as done or threatened to her personally by her husband—one a threat to slap her jaws and the other jerking her out of bed when her child was only four days old—and she also testified as to his general kind treatment of her. Now the testimony of Mrs. Moss, which is here in question, was manifestly introduced for two purposes: 1. To assail the credit of Mrs. Mur-

dock by showing that her testimony, denying that her husband had jerked her out of bed when her child was only four days old, was not true; 2. To impeach the general character of Willis M. Wilson, one of the five witnesses introduced by the state, in reply, to sustain the peaceable character ⁴³ of the deceased, which had been assailed by the testimony of the defense.

As to the first, it would have been clearly incompetent to receive the evidence of Mrs. Moss, at any time, to contradict Mrs. Murdock as to a collateral issue, brought out in her cross-examination. The rule upon this subject is thus stated in 10 Encyclopedia of Pleading and Practice, 294, 295: "The cross-examining party is concluded by the answer which a witness gives to a question concerning a collateral matter, and no contradiction will be allowed, even for the purpose of impeaching the witness." This rule has been, in express terms, recognized in this state in the comparatively recent case of *State v. Wyse*, 33 S. C. 592, 593, as based upon the authority of the standard text-writers on evidence—Starkie, Phillips, and Greenleaf—and other authorities there cited. It is true that one exception to this rule is there recognized, which, however, has no application to the present case. Now, in this case, the issue which the jury were called upon to try was whether the defendant was guilty of the offense charged in the indictment, and not whether he had been guilty of brutal treatment of his wife; the latter issue was, therefore, clearly a collateral issue, and, under the authorities above cited, it was not competent to introduce testimony to contradict the testimony of Mrs. Murdock as to such collateral issue, brought out on her cross-examination.

As to the second purpose for which the testimony of Mrs. Moss was offered—to impeach the general character of the witness, Willis M. Wilson—it seems to me that was a matter for the discretion of the circuit judge; and I see nothing whatever in the case to warrant the idea that such discretion was abused. In 8 Encyclopedia of Pleading and Practice, 133, 134, I find the following language: "And it is within the discretion of the court to permit the introduction of evidence in surrebuttal where the plaintiff, in reply, has not transgressed the proper bounds of evidence in rebuttal, though in that case the privilege cannot be claimed as matter ⁴⁴ of right." The same view is manifestly recognized in the case of *State v. Jones*, 29 S. C. 231, where it is said: "The true view is that, when the state or a plaintiff attacks the character of a witness for the defense, a new issue is then raised which could not have been be-

fore presented, and upon such new issue the defense has the right to offer testimony, as it could not before have been offered. It will not do to say, as has been said, that the view which we have taken would lead to interminable protraction of the investigation, and the controversy might go on indefinitely; for it must be remembered that *the extent of the inquiry into character is sufficiently under the discretion of the court to prevent the evil result apprehended*" (italics mine). While, therefore, there are certain rules regulating the time and manner in which testimony is to be introduced, yet, as was said in *State v. Clyburn*, 16 S. C. 378, upon the authority of the cases there cited: "The conduct of a case in the circuit court, so far as it relates to the time when testimony may be introduced, must be left to the discretion of the circuit judge, to be governed by the particular circumstances of each case." Now, when the circuit judge in this case found that the proposition was to impeach the general character of Wilson, who had testified solely as to the peaceable character of the deceased, he might very well have concluded that such a departure from the general rule was not only unwarranted by the particular circumstances of this case, but might lead to an indefinite protraction of an inquiry into character merely, and should not be permitted. At all events, I am unable to perceive any error of law in the ruling complained of. It seems to me, therefore, that the judgment of the circuit court should be affirmed.

The Law of Self-defense.

We shall treat, in this note, only of self-defense as an excuse for homicide. Every person has the right to defend himself and his property from aggression of many kinds. The great body of the law relating to this right, however, is concerned with it as a defense when one has killed a human being. One may repel force with force, and protect his property from the unwarranted and unlawful violence of others. But most of the questions regarding the exercise of such rights are of comparatively small moment unless the death of a human being has resulted.

Necessity for Reasonable Belief of Imminent Danger.—It may be laid down as a general rule that in order to justify the killing of a human being on the ground of self-defense, it must appear that, at the time of the killing, the accused was acting under a reasonable belief that he was in imminent danger of death or of great bodily harm from the deceased, and that it was necessary for him to kill the deceased, in order to prevent the death of, or great bodily harm to, himself. This proposition is supported by very numerous authorities and by many of the decisions we shall cite later. The

principle was stated thus in *State v. Wells*, 1 N. J. L. 424, 1 Am. Dec. 211: "No man is justified or excusable in taking away the life of another, unless the necessity for doing so is apparent as the only means of avoiding his own destruction or some very great injury." And in *Noles v. State*, 26 Ala. 31, 62 Am. Dec. 711, the court said that "to excuse one individual for taking the life of another, there must exist a necessity to prevent the commission of a felony, or great bodily harm, or a reasonable belief in the mind of the slayer that such necessity does exist. If there is neither the existence of such necessity nor any reasonable belief of its existence, the law will not acquit the slayer of all guilt": See further on the same question, *Askew v. State*, 94 Ala. 4, 33 Am. St. Rep. 83; *Commonwealth v. Breyessee*, 160 Pa. St. 451, 40 Am. St. Rep. 729; *People v. Batchelder*, 27 Cal. 69, 85 Am. Dec. 231; *State v. Gentry*, 125 N. C. 733; *Kilgore v. State* (Ala.), 27 So. Rep. 4. In a recent Texas case—*Thompson v. State*, 38 Tex. Cr. Rep. 335—the court said: "Undoubtedly, a party restrained of his or her liberty has the right to resist force with force, but unless the deceased, at the time he was restraining her, was doing some act which reasonably appeared to the defendant to endanger her life, or threaten her with serious bodily injury, then she had no right to take his life; and unless the violence of his assault in his attempted restraint of her was such as to reasonably cause her to apprehend that he was about to take her life, or to inflict upon her serious bodily injury, she had no right to kill him." Some of the cases go very far in their statement as to the duty of an accused before he can resort to the necessity of killing his adversary. Thus, in *People v. Kennedy*, 159 N. Y. 346, 70 Am. St. Rep. 557, it was said that "before a party can justify the taking of life in self-defense, he must show that there was reasonable ground for believing he was in great peril; that the killing was necessary for his escape, and that no other safe means was open to him. When one believes himself about to be attacked by another, and to receive great bodily injury, it is his duty to avoid the attack if in his power to do so, and the right of attack for the purpose of self-defense does not arise until he has done everything in his power to avoid its necessity": See, also, *Smith v. State*, 106 Ga. 673, 71 Am. St. Rep. 286. If the homicide should be purposely committed, it is not excusable on the ground of self-defense, unless the accused reasonably believed it necessary to save his own life or avoid great bodily harm: *Commonwealth v. McGowan*, 189 Pa. St. 641, 69 Am. St. Rep. 836; *McDermott v. State*, 89 Ind. 187. The intent with which the homicide was committed seems to be immaterial, providing the right of self-defense existed. In fact, the killing is usually purposely done, even though it may not be with malice. And yet if it is done with malice, it cannot be murder or even manslaughter if the right of self-defense actually existed. "If, then, the right of self-defense existed, it was wholly immaterial whether its exercise was volun-

tary or involuntary. Existing the right, the animus which prompts and accompanies its enforcement could not toll that right": *State v. Rapp*, 142 Mo. 443. As indicated in this case, the idea was very forcibly put by Lumpkin, J., in *Golden v. State*, 25 Ga. 527: "Whenever the circumstances of the killing would not amount to murder, the proof even of express malice will not make it so. One may harbor the most intense hatred toward another; he may court an opportunity to take his life; may rejoice while he is imbruing his hands in his heart's blood; and yet, if, to save his own life, the facts showed that he was fully justified in slaying his adversary, his malice shall not be taken into the account." The blow, however, must have been struck in self-defense. And if a blow is struck after the necessity for self-defense has passed, the party will be liable therefor to the extent of the injury it causes. Hence, it has been held that if one wound is inflicted while acting in self-defense and another after the deceased has declined all further combat and was fleeing from the defendant, and each wound was sufficient to have produced death, he may be adjudged guilty of murder in inflicting the last wound, if it contributed to the death, though had it not been inflicted the deceased would have died from the wound given by the defendant while acting in necessary self-defense: *Rogers v. State*, 60 Ark. 76, 46 Am. St. Rep. 154.

In order to justify a killing in self-defense the danger must be immediate. It is not sufficient that the deceased threatens injury and is going to prepare himself to commit it. As the court said in *Bush v. State* (Tex.), 51 S. W. Rep. 238: "In order to justify the homicide on the ground of self-defense, either with or without threats, the danger must be apparently or really immediate, and pressing, imminent, and unavoidable." To the same effect, see *Lynch v. State*, 24 Tex. App. 350, 5 Am. St. Rep. 888; *Brown v. State*, 83 Ala. 33, 3 Am. St. Rep. 685; *Jackson v. State*, 91 Ga. 271, 44 Am. St. Rep. 22; *People v. Westlake*, 62 Cal. 303; *People v. Tamkin*, 62 Cal. 468.

The most difficult question that arises in this branch of our inquiry is whether the belief that the danger is apparently imminent is to be viewed from the standpoint of the defendant, or from that of a reasonable man, or from that of the jury, having all the facts before them. That the danger need only be apparent and not real is universally recognized. "Actual and positive danger is not indispensable to justify self-defense," said the court in *Campbell v. People*, 16 Ill. 17, 61 Am. Dec. 49. "If one is assaulted with a pistol in such a way as to manifestly show a design to slay him, he may be justified in killing his assailant, although it should turn out the pistol was not loaded, and the only design was to frighten him. Men, when threatened with danger, are obliged to judge from appearances, and determine by the actual state of things, from the circumstances surrounding them, at least as much as if placed in other and less exciting positions; and it would be monstrous to say

that if they act from real and honest convictions, induced by reasonable evidence, they shall be held responsible criminally for a mistake in the extent of the actual danger, where other reasonable and judicious men would have been alike mistaken. A contrary rule would make the law of self-defense a snare and a delusion. It would become but a mockery of the sacred right of self-preservation": See, further, *Redd v. State*, 99 Ga. 210; *Menly v. State*, 26 Tex. App. 274, 8 Am. St. Rep. 477; *Ingram v. State*, 62 Miss. 142.

The standpoint of the jury from the facts proved is certainly not the proper test as to whether the danger was imminent, for the defendant at the time he is defending himself cannot know what the jury do after all the facts have been proved to them. An unloaded pistol is an apparent danger to one who does not know that fact, but to a jury who do know it, it ceases to be a source of danger. There are some loose statements in some of the cases which would seem to make the jury the sole judges as to existence of danger, and if they found there was no danger, the defendant cannot be acquitted on the ground of self-defense: See *People v. Lamb*, 2 Abb. Pr., N. S., 148; *State v. Hollis*, 1 Houst. Cr. Cas. 24; *State v. Newcomb*, 1 Houst. Cr. Cas. 66. There can be no doubt that this is not the rule, however, and the jury are to determine not what the actual facts were, but what they appeared to be: See *Pinder v. State*, 27 Fla. 370, 26 Am. St. Rep. 75.

Mr. Wharton, in his work on Criminal Law, points out that it is impracticable to take an ideal reasonable man as the standard in ascertaining whether the danger is imminent or not. This test, however, that the danger must be such as to appear to be imminent to a reasonable person in order to justify a killing in self-defense, is given expression in many cases. In *People v. Batchelder*, 27 Cal. 69, 85 Am. Dec. 231, an instruction was held correct which stated that the circumstances must be such as to excite the fears "of a reasonable person." A similar instruction was held good in *People v. Morine*, 61 Cal. 367, but the subsequent instructions so limit the matter of the reasonableness of defendant's actions that it is difficult to ascertain what the real test is. In *People v. Lynch*, 101 Cal. 229, however, it is clear that the court approved the test that the danger must be such that an ordinarily prudent man would believe that it was great. The same test was approved in *State v. Sadler*, 51 La. Ann. 1397, and also in *Alvarez v. State* (Fla.), 27 So. Rep. 40, where the court said: "While the danger need not be actual, nor the necessity to kill real, yet the circumstances surrounding, and as they appear to the slayer at the time he does take life, must be such as would induce a reasonably cautious man to believe that the danger was actual, and the necessity real, in order that the slayer may be justified in acting upon his own belief to that effect." *Steinmeyer v. People*, 95 Ill. 383, seems to recognize this test, and there are other Illinois cases to the same effect: *Campbell v. People*, 16 Ill. 17, 61 Am. Dec. 49; *Maher v. People*, 24 Ill. 241;

Schnier v. People, 23 Ill. 11. See, also, State v. Fortenot, 50 La. Ann. 537, 69 Am. St. Rep. 455; State v. Warren, 1 Marv. (Del.) 487. In discussing this question of a reasonable man believing in the danger, Mr. Wharton says: "But who is the 'reasonable man' who is thus invoked as the standard by which the 'apparent danger' is to be tested? What degree of 'reason' is he to be supposed to have? If he be a man of peculiar coolness and shrewdness, then he has capacities which we rarely discover among persons fluttered by an attack in which life is assailed; and we are applying, therefore, a test about as inapplicable as would be that of the jury who deliberate on events after they have been interpreted by their results. Or, if we reject the idea of a man of peculiar reasoning and perceptive powers, the selection is one of pure caprice, the ideal reasonable man being an undefinable myth, leaving the particular case ungoverned by any fixed rule. And that this ideal reasonable man is an inadequate standard is shown by a conclusive test. Suppose the ideal reasonable man would, at the time of the conflict, have believed that a gun aimed by the deceased was loaded, whereas in point of fact the defendant knew the gun was not loaded; would the defendant be justified in shooting down an assailant approaching with a gun the defendant knows to be unloaded, simply because the ideal reasonable man would suppose the gun to be loaded? No doubt that in such case no honest belief of the ideal reasonable man would be a defense to the defendant who knew that the belief was false, and that he was not really in danger of his life. And, if the belief of the ideal reasonable man be not admissible to acquit, a fortiori, it is inadmissible to convict": 1 Wharton's Criminal Law, sec. 489.

Certainly, the defendant's standpoint is the proper one from which to view the imminency of the danger. If the belief that he is in danger of losing his life or of suffering great bodily harm is reasonable from his point of view, and such belief is honest and not due to his own negligence, then the homicide may be justified as having been done in self-defense. The authorities are unanimous in viewing the matter from the defendant's standpoint to the extent of holding that the defendant's belief must be honest: People v. Lennon, 71 Mich. 298, 15 Am. St. Rep. 259; State v. Frazier, 137 Mo. 317; Redd v. State, 99 Ga. 210.

Mere honesty, however, is not in itself sufficient. The defendant must be free from fault or carelessness. If his belief is due to his own negligence, his honesty is not sufficient to justify the killing as having been done in self-defense: Smith v. State, 59 Ark. 132, 43 Am. St. Rep. 20.

The defendant must likewise have had reasonable grounds for his belief: Commonwealth v. McGowan, 189 Pa. St. 641, 69 Am. St. Rep. 836. But, the question of reasonableness should be determined from the standpoint of the defendant, and not from that of an ideal reasonable man or even from that of the jury. The jury, in deter-

mining whether the accused had reasonable grounds for his fear, must place themselves in the position of the defendant. And if, standing in his shoes, they can say that his belief was reasonable to him, the sufficiency of his defense is established. There is, as we have said, a conflict in the decisions on this point, but reason is clearly on the side of the defendant's reasonableness as furnishing the true test. The jury, of course, are to be the final judges of whether the danger was apparent, but they are to judge of this from the defendant's point of view. To ascertain the danger from any other point of view is to make the law of self-defense available only to a certain class of men, or to men who come up to the standard of that class. Those who act in self-defense would do so at their peril, and the right would be a most uncertain one. This seems to be the doctrine of *Wesley v. State*, 37 Miss. 327, 75 Am. Dec. 62, the soundness of which we question on this point. Here the court said: "A party may have a lively apprehension that his life is in danger, and believe that the ground of his apprehension is just and reasonable; but, if he act upon them, and take the life of a human being, he does so at his peril. He is not the final judge, whatever his apprehension or belief may have been of the reasonableness of the grounds upon which he acted. That is a question which the jury alone are to determine."

The reason and weight of authority is that the danger must appear urgent and pressing to the accused. He is the one who is called upon to judge whether it is reasonably necessary for him to take life in self-defense. As was said in *Patten v. People*, 18 Mich. 314, 100 Am. Dec. 173: "The defendant was excusable for acting according to the surrounding circumstances as they appeared to him; and if, from those circumstances, he believed there was imminent danger of death or great bodily harm to himself or any member of his family, then, if he had already tried every other reasonable means which would, under the circumstances, naturally occur to an honest and humane man to ward off the danger or repel the attack, he might resort to such forcible means, even with a dangerous weapon, as he believed to be necessary for protection; and, if such means resulted in the death of the supposed assailants, the homicide would be excusable. . . . To require of the defendant, while under a high degree of mental excitement, induced by their wrongful and criminal conduct, and without his fault, the same circumspection, and cool, deliberate judgment, in estimating the danger or the choice of means for repelling it, as we, who are unaffected by the excitement or the danger, may now exercise in contemplating it, would be to ignore the laws of our being, and to require a degree of perfection to which human nature has not yet attained. Of the weight a jury should give to these considerations, no safer standard can be found than their own individual consciousness, and the consideration of what they, with the honest purpose of avoiding the danger, without unnecessarily taking life,

might, under the circumstances in which the defendant was placed, be likely to do. . . . A party assailed is justified in acting upon the facts as they appear to him, and is not to be judged by the facts as they are": *State v. Reed*, 53 Kan. 767, 42 Am. St. Rep. 322. In *Gonzales v. State*, 28 Tex. App. 130, the court, in criticising an instruction of the trial court on this point, said: "In explaining the rule as to apparent danger, it does not distinctly direct the jury that the danger must be judged of from the defendant's standpoint, and no other, and from all the circumstances proved. . . . The jury should have been told that if, at the time the defendant fired the fatal shot, it reasonably appeared to him from the circumstances of the case, viewed from his standpoint, that the deceased was then about to shoot him with a gun or pistol, he was justified in killing the deceased, although, in fact, they might believe from the evidence that the defendant was in no danger at the time of being shot by the deceased." The same court, in *Bell v. State*, 20 Tex. App. 445, stated the rule thus: "The party killing, to justify, must have reasonable apprehension or fear of death or serious bodily harm, at the time of the killing. . . . But to whom must the appearance of danger—the apprehension of the party killing—reasonably appear? To the jury after hearing all the evidence—after ascertaining the real facts? . . . Or, must the real or apparent danger appear to defendant at the time of the homicide to be reasonable? We think the latter correct. The jury must view the facts upon his standpoint. Each juror must place himself in the position of the defendant at the time of the homicide, and determine from all the facts, as they appeared to defendant at the time of the killing, whether his apprehension or fear of death or serious bodily harm was reasonable; and, if so, they should acquit": See, to the same effect, *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20; *Watkins v. United States* (Ind. Ter.), 41 S. W. Rep. 1045; *Graininger v. State*, 5 Yerg. 459, 26 Am. Dec. 278; *Logue v. Commonwealth*, 38 Pa. St. 265, 80 Am. Dec. 481; *Pond v. People*, 8 Mich. 150. The case of *People v. Lennon*, 71 Mich. 298, 15 Am. St. Rep. 259, well illustrates the justice of the rule that the danger must be viewed from the defendant's standpoint. In this case the defendant was sickly and easily frightened, and perhaps something of a coward. In criticising an instruction of the trial court, it was said: "I do not think it proper that a jury should be authorized to determine the standard of courage in a case of self-defense, whether the party attacked, in what he did in his defense, acted cowardly, and therefore without warrant. There is no question of courage or cowardice in the case. . . . The question to be determined is, Did the accused, under all the circumstances of the assault, as it appeared to him, honestly believe that he was in danger of his life, or great bodily harm, and that it was necessary to do what he did in order to save himself from such apparent, threatened danger? If so, the inquiry is ended. It can and ought to make no difference

whether he was a bold, strong man, used to affrays and personal encounters, or a weak, timid man, unacquainted with broils or assaults, as to the sufficiency of his reason for his action, if the jury believe that he acted honestly in fear of his life or great bodily harm. The fact of his physical and mental make-up, and his experience in danger, are to be considered, it is true, as bearing upon the honesty of his alleged belief, upon which he bases his right to act; but in such consideration the fact that the accused is weak, timid, and cowardly by nature is to be weighed in his favor, and not against him. To hold otherwise would be to set at naught and to rule at variance with the well-known laws of human nature, and to place the weak and timid at the mercy of the strong. It is bad enough to be constitutionally a coward, without having the law also declare that the coward has no right to act in self-defense until he reaches the point where a man of average courage would have defended himself in the same manner, and to have the quantum of courage necessary in such cases determined by a jury sitting in safety and cool blood, listening to what must always be a tame recital of the facts compared to their appearance at the time they occurred." It is difficult to determine from many of the cases just what the court means by saying that the defendant must act upon reasonable grounds, so that the conflict in the decisions may often be more apparent than real, and, if the question should arise squarely, the court might say that the reasonableness of the grounds upon which the accused acted must be determined from his point of view.

Grounds for Believing Danger Imminent.—The defendant must have reasonable grounds for believing the danger to himself is sufficiently great to justify the taking of life. And, while this question must be viewed from the standpoint of the defendant, yet the jury must pass upon it, and it will be of value to ascertain what have been deemed reasonable grounds upon which a defendant may act. In the first place, there must generally be some act or demonstration on the part of the deceased which induced a reasonable belief in the defendant that he was about to lose his life or suffer some great bodily harm. It is not sufficient that the deceased had the means at hand with which he could have inflicted the injury, if there was no act or demonstration which would indicate that he intended to do so: *Harrison v. State*, 24 Ala. 67, 60 Am. Dec. 450. Mere words or threats do not generally furnish sufficient grounds for believing that the danger is imminent: *Taylor v. State*, 48 Ala. 180; *Mize v. State*, 36 Ark. 653; *People v. Tamkin*, 62 Cal. 468; *People v. Scoggins*, 37 Cal. 676; *Parsons v. Commonwealth*, 78 Ky. 102; *State v. Elliott*, 90 Mo. 350; *State v. Rider*, 90 Mo. 54; *Penland v. State*, 19 Tex. App. 365. And, while provocation by words, threats, menaces, or contemptuous gestures is not sufficient to reduce a homicide below the grade of murder, when the killing is done, not on account of any fear in the mind of the slayer, but solely to resent the provocation given, yet such acts may in some instances be

sufficient to arouse the fears of a reasonable man that his life is in danger, and, if the jury so find, the killing will be justified as having been done in self-defense: *Johnson v. State*, 105 Ga. 665; *Cumming v. State*, 99 Ga. 662. The question is whether danger to the defendant was imminent. If it was, he is justified in killing his adversary, although the particular overt act may consist of nothing more than threats and menaces. Each case must be judged on its own facts, and if the threats or menaces are sufficient to cause a reasonable fear in the defendant that his life is in danger, a killing in consequence of that fear is justified. The matter was very clearly stated in *Cumming v. State*, 99 Ga. 662: "The overt act that will justify a defendant in assuming that his own life is then in danger must depend upon the circumstances of each particular case. Cases may be readily supposed, and no doubt often occur, where to require a defendant to wait until his adversary actually begins the combat would be to require him to wait until there would be but little chance left of successful defense—cases where the deadly purpose of the party is so fixed and determined, his character so reckless and bloody, his use of deadly weapons so expert and skillful, that to await his attack would be to await almost certain death; and the result of the rencounter would often depend upon which party was the quicker in action. In cases of this character, where the parties meet, a very slight movement might justify either party in acting at once upon the assumption that his life is then in instant peril. Or, cases might occur where the fact that the deceased met the defendant under the particular circumstances and in connection with previous facts might show that the deceased sought the meeting with a deadly purpose, and be in itself an overt act. These are doubtless extreme cases; but they are used to show that the overt act spoken of is a question depending upon the entire circumstances of each particular case; and, also to illustrate the meaning of the expression that the danger must be imminent at the moment." Accordingly, it has been held that a person about to be attacked is not bound to wait until his adversary gets "the drop on him" before he can take steps to defend himself, but he may safely act upon appearances and kill in self-defense: *State v. Matthews*, 148 Mo. 185, 71 Am. St. Rep. 594; *Bohannon v. Commonwealth*, 8 Bush, 481, 8 Am. Rep. 474; and see *State v. Scossoni*, 48 La. Ann. 1464.

It is not necessary that the assault should be with a deadly weapon. An assault with the fists alone, if there is apparent ability to inflict great bodily injury, is sufficient to justify a killing in self-defense: *High v. State*, 26 Tex. App. 545, 8 Am. St. Rep. 488. The homicide need not be necessary to save defendant's life; it is sufficient if the danger threatened is great bodily harm: *State v. Benham*, 23 Iowa, 154, 92 Am. Dec. 417. In Georgia the bodily harm threatened must amount to a felony, or the killing to prevent it cannot be justified on the ground of self-defense: *Battle v. State*.

103 Ga. 53. One is generally not justified in taking life to prevent an unlawful arrest: *Rafferty v. People*, 69 Ill. 111, 18 Am. Rep. 601; *State v. Symes*, 20 Wash. 484; *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97. If, however, in resisting an unlawful arrest, which one has the right to do, it becomes necessary to save one's life or to save one's person from great bodily harm, a person may kill the one attempting to make the arrest, and such killing will be justifiable: *Creighton v. Commonwealth*, 84 Ky. 103, 4 Am. St. Rep. 193; *State v. Davis*, 53 S. C. 150, 69 Am. St. Rep. 845. And even in the case of a legal arrest, if the power to arrest is exercised in such a wanton and menacing manner as to threaten the defendant with loss of life or great bodily harm, the defendant may kill in self-defense and his act will be justifiable: *Jones v. State*, 26 Tex. App. 1, 8 Am. St. Rep. 454.

A person is entitled to defend himself against an intoxicated person. But the degree of intoxication may be such as to render such a person less dangerous than he would otherwise be, and hence render the necessity less for killing such a person in defense of life. The fact of intoxication may be considered by the jury in determining whether the defendant's grounds for fearing danger to himself were reasonable: *Askew v. State*, 94 Ala. 4, 33 Am. St. Rep. 83; *State v. Copeland*, 106 Iowa, 102. Intoxication which was unknown to the defendant, and which could not be readily ascertained from the actions of the deceased, should not, in principle, be considered, if the defendant's standpoint is the proper one from which to ascertain the reasonableness of the danger. Where the necessity arose of choosing between committing homicide and turning loose a "wild and skittish mule," and the defendant chose the former, the conditions necessary to make out a case of self-defense are not established: *Springfield v. State*, 96 Ala. 81, 38 Am. St. Rep. 85.

Duty to Retreat.—The general rule at common law was that a person assaulted was obliged to retreat to the wall before he could kill in self-defense. If retreat were possible without endangering one's life, he must retreat, or the killing could not be justified on the ground of self-defense. It is doubtful whether this is the prevailing rule to-day, and we cannot say it is the better rule. In many jurisdictions it has been repudiated. See, as supporting this rule, *State v. Donnelly*, 69 Iowa, 705, 58 Am. Rep. 234; *Logue v. Commonwealth*, 38 Pa. St. 265, 80 Am. Dec. 481; *State v. Shippey*, 10 Minn. 223, 88 Am. Dec. 70; *People v. Constantino*, 153 N. Y. 24; *Allen v. United States*, 164 U. S. 492; *Kilgore v. State* (Ala.), 27 So. Rep. 4; *Welch v. State* (Ala.), 27 So. Rep. 307; *People v. Kennedy*, 159 N. Y. 346, 70 Am. St. Rep. 557; *Commonwealth v. Breyessee*, 160 Pa. St. 451, 40 Am. St. Rep. 729; *Brown v. State*, 83 Ala. 33, 3 Am. St. Rep. 685; *Springfield v. State*, 96 Ala. 81, 38 Am. St. Rep. 85; *State v. Warren*, 1 Marv. (Del.) 487. The ground upon which it is held that retreat is necessary is that if a man can

save his own life and his body from great harm by retreating, retreat he must, because to save his life and himself from great harm is the only justification for the killing, and if he can save himself by other means than by killing (such as by retreating), he is obliged to do so: *State v. Wells, Coxe*, 424, 1 Am. Dec. 211. "There may be cases," said the court, in *State v. Kennedy*, 91 N. C. 572, "though they are rare and of dangerous application, where a man in personal conflict may kill his assailant without retreating to the wall": See, also, *State v. Gentry*, 125 N. C. 733. There seem to have been but two well-recognized exceptions to the rule that one must retreat to avoid the killing of an adversary. These are where the retreat would of necessity increase the peril of the person assaulted, and where the person is on his own premises. The obligation to retreat is not unqualified, but, "to excuse the failure to retreat, the circumstances must be such as that the defendant's peril would have been increased thereby beyond that to which he would have been subjected had he stood and defended himself against his assailant; or were such as to impress the mind of a reasonable man that the peril would have been thereby increased, and that he was so impressed": *Bell v. State*, 115 Ala. 25. In *State v. Kennedy*, 91 N. C. 572, it was held that to justify a failure to retreat, "the assault must have been so fierce as not to allow the person assailed to yield at all without manifest danger to his life, or of enormous bodily harm; then if there be no other way of saving his life, or avoiding such harm, he may kill his adversary instantly": See, further, on the proposition that one need not retreat if it would manifestly endanger his life, *State v. Donnelly*, 69 Iowa, 705, 58 Am. Rep. 234; *Newell v. Leathers*, 50 La. Ann. 162, 69 Am. St. Rep. 395; *State v. Partlow*, 90 Mo. 608, 59 Am. Rep. 31. A police officer furnishes an exception to the rule that a person must retreat to the wall if possible: *Boykin v. People*, 22 Colo. 496; *State v. Gosnell*, 74 Fed. Rep. 734. The second exception to the rule that one must retreat before he can kill in self-defense arises when the assault is made on a person while on his own premises. A person has the right to defend himself in his own dwelling-house, and is not required to escape therefrom when assaulted therein if he believes, and has reasonable ground to believe, that another is about to take his life, or inflict upon him great bodily harm: *Estep v. Commonwealth*, 86 Ky. 39, 9 Am. St. Rep. 260. One need not retreat from his own house, even though he can do so with safety: *Brinkley v. State*, 89 Ala. 34, 18 Am. St. Rep. 87. He may even pursue his adversary in his own house until he has secured himself from all danger: *People v. Lewis*, 117 Cal. 186, 59 Am. St. Rep. 167. In this last case it was said, quoting from Wharton's *Criminal Law*: "When a person is attacked in his own house he need retreat no further. Here he stands at bay and may turn on and kill his assailant, if this be apparently necessary to save his own life. Nor is he bound to escape from his house in order to

avoid the assailant. In this sense, and in this sense alone, are we to understand the maxim that every man's house is his castle. An assailed person—so we may paraphrase the maxim—is not bound to retreat out of his house to avoid violence, even though a retreat may be safely made”: See, further, *State v. Cushing*, 14 Wash. 527, 53 Am. St. Rep. 883; *Karr v. State*, 100 Ala. 4, 46 Am. St. Rep. 17; *People v. Newcomer*, 118 Cal. 263; *Foster v. Territory (Ariz.)*, 56 Pac. Rep. 738. Where one is in the office of a hotel he is not obliged to retreat: *Rowe v. United States*, 164 U. S. 546. A room in a store in which one sleeps is not such a “dwelling-house” as relieves one from the duty of retreating to avoid killing in self-defense: *State v. Smith*, 100 Iowa, 1. One must, however, be within his house, or at least within the curtilage, and not merely upon his own property in order to avoid the necessity of retreating to the wall. This was well expressed in *Lee v. State*, 92 Ala. 15, 25 Am. St. Rep. 17: “It would seem,” said the court, “that the special privileges pertaining to a man in his own habitation are available for his protection only while he is in such space as is usually occupied for the purposes of the dwelling and the customary outbuildings: *Pond v. People*, 8 Mich. 150. The very circumstance of one being within the precincts of his dwelling, or of his business house serves as a warning to deter an assailant from intruding therein. No such evidence as a disposition to avoid combat, or to get out of reach of danger is afforded by the conduct of one who, when assaulted, merely withdraws to his own land, and there halts in a position exposed to attack. Manifestly, he has not availed himself of such shelter and protection as his house affords. He has not sought what is known of all men as an asylum of safety. His act is not calculated to give pause to one in pursuit. The common law would not say that he had gone to the wall. And we cannot say that he had fulfilled the duty to retreat. Nothing has been found in the books to indicate that a man, when upon his own land, is to be regarded as at bay, so as to be under no duty to yield further to an assailant, unless he is in his house, or within the curtilage or space usually occupied and used for the purposes of the house. When he is elsewhere upon his own land, the reasons which excuse him from withdrawing from the place which is to him as his castle and fortress do not apply: *Jones v. State*, 76 Ala. 8; note to *State v. Patterson*, 12 Am. Rep. 212. Not until he has reached this place of refuge can he claim the protection and privileges afforded thereby. When beyond its precincts, though upon his own land, he is under the duty to retreat, when retreat with safety to himself is practicable.” A person must remain in his own domicile if he expects to take advantage of the rule that no retreat is necessary; for if he leaves his domicile, this principle no longer applies, and retreat then becomes a duty if it is possible: *Martin v. State*, 90 Ala. 602, 24 Am. St. Rep. 844. Kentucky seems to have grafted another exception upon the rule that retreat is a

duty if possible. This exception is that where one is attacked by such a determined and persevering enemy that an escape by retreating would not secure his ultimate safety, the person attacked is not required to retreat if he can, but may stand his ground, and will be excused if he kills his assailant: *Phillips v. Commonwealth*, 2 Duvall, 328, 87 Am. Dec. 499. This exception would appear to be of difficult application except in a community where family feuds were prevalent and their existence easily proved. Otherwise, the rule is certainly correct, since a retreat would but increase the danger. As was said in this case: "An escape from immediate danger is only momentary, and may be no escape from the danger still impending, and perhaps increased; because running once may induce the assailant to believe that the assailed will never stand and manfully defend himself, and thus embolden him to renew his attacks without apprehension of any resistance perilous to himself. If the party once assailed by an enemy who had threatened to kill him is bound by law to run if he can thereby escape that assault, legal self-defense may become a mockery, and the sacred right itself a shadow. Like the sword of Damocles, the threatened danger is continually impending every moment and everywhere. The threatened man may be waylaid, or otherwise attacked unawares, without the possibility of defense or escape; and may never, day or night, feel safe, or actually be so, while his enemy lives, who, whenever he may see him, or wherever he can find him, may be anxious and able to kill him." Much of this reasoning would apply to any unlawful attack on a person which threatens him with death or great bodily harm. And we believe the better rule to be; and the tendency of American authority is in this direction, that one who is unlawfully assailed may stand his ground and defend himself even to the taking of life, if that should prove necessary, and he is under no duty to retreat to the wall, even if such a course is possible. If this rule that one is obliged to retreat were carried to its logical conclusion, a person would be obliged to keep continually out of the way of one who threatened his life, and his liberty would thus be greatly interfered with. The rule insists that one should avoid killing if possible, and if the only way to do this is by keeping out of the way of his assailant, the rule would logically demand such action on the part of the one assaulted. Such an interference with personal freedom of action is clearly not within the meaning of the rule even in those jurisdictions where it is applied: *State v. Matthews*, 148 Mo. 185, 71 Am. St. Rep. 594. The tendency of modern cases on the duty to retreat was correctly stated in *Runyan v. State*, 57 Ind. 80, 26 Am. Rep. 52, where the court said: "A very brief examination of the American authorities makes it evident that the ancient doctrine, as to the duty of a person assailed to retreat as far as he can before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than

formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts bearing on the general subject of the right of self-defense. The weight of modern authority, in our judgment, establishes the doctrine that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable." This was quoted with approval in *Beard v. United States*, 158 U. S. 550, and in *Foster v. Territory (Ariz.)*, 56 Pac. Rep. 738. *Erwin v. State*, 29 Ohio St. 186, 23 Am. Rep. 733, is an excellent case on the law of self-defense, and shows that the apparent conflict in the cases is less than is frequently supposed, if it is borne in mind that there are two kinds of self-defense, justifiable and excusable. Justifiable self-defense exists where the one who is attacked is in the lawful pursuit of his business and without blame. In such a case he can stand his ground and need not retreat, and is justified if he is compelled to kill his adversary in defense of his life. Excusable homicide exists where the one attacked is to some extent in fault by reason of provocation. In such a case he is obliged to retreat and avoid taking life if possible, and, if he is eventually obliged to kill to save his life, such killing is excusable. This, we believe, is the correct rule, though departed from in many cases. In this case the court said: "Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so? The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life, where the assault is provoked; but a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm." This language was quoted with approval in *People v. Lewis*, 117 Cal. 186, 59 Am. St. Rep. 167. And in *People v. New-comer*, 118 Cal. 263, the court used this language: "When a man, without fault himself, is suddenly attacked in a way that puts his life or bodily safety at imminent hazard, he is not compelled to fly or to consider the proposition of flying, but may stand his ground and defend himself to the extent of taking the life of the assailant, if that be reasonably necessary." To the same effect, see *Carpenter v. State*, 62 Ark. 286; *La Rue v. State*, 64 Ark. 144; *State v. Reed*, 53 Kan. 767, 42 Am. St. Rep. 322; *State v. Robertson*, 50 La. Ann. 92, 69 Am. St. Rep. 393; *People v. Ye Park*, 62 Cal. 204; *People v. Hecker*, 109 Cal. 451; *State v. Hatch*, 57 Kan. 420, 57 Am. St. Rep. 337.

Provoking the Difficulty.—The rule is thoroughly established and in its general terms is universally recognized that a plea of self-defense cannot be sustained where the defendant shows that he was the aggressor and provoked the difficulty, or where he acted in retaliation. Neither state of facts is sufficient to show that necessity upon which the law of self-defense is based: *State v. Benham*, 23 Iowa, 154, 92 Am. Dec. 417; *People v. McLeod*, 1 Hill, 377, 37 Am. Dec. 328; *People v. Conkling*, 111 Cal. 616; *Brown v. State*, 83 Ala. 33, 3 Am. St. Rep. 685; *State v. Warren*, 1 Marv. (Del.) 487; *Levy v. State*, 23 Tex. App. 292, 19 Am. St. Rep. 826; *State v. Hopkins*, 50 La. Ann. 1171; *Moore v. People* (Colo.), 57 Pac. Rep. 857; *State v. Jacobs*, 28 S. C. 29; *State v. Scott*, 41 Minn. 265; *Wilson v. People*, 94 Ill. 290; *Gainey v. People*, 97 Ill. 270, 37 Am. Rep. 109; *Deal v. State*, 140 Ind. 354; *Rogers v. State*, 95 Tenn. 448; *State v. Trammell*, 40 S. C. 331, 42 Am. St. Rep. 874. The importance of this is shown by the court in *Crawford v. State*, 112 Ala. 1, where the trial court refused to instruct the jury that the defendant must be "reasonably free from fault." The court said: "This court has strenuously insisted upon, and vigorously enforced, the doctrine that the plea of self-defense is not available to a defendant who is not free from fault in the creation of a necessity to take the life or to do grievous bodily harm to another. This doctrine is too important, too conservative of human life and of good order, to allow it to be frittered away. . . . The law admits of no qualification of this requirement. The defendant must have been free from all fault or wrongdoing, on his part, which had the effect to provoke or bring on the difficulty." The words "reasonably free from fault" which were criticised in this case as not properly stating the law were approved in *Lovett v. State*, 30 Fla. 142.

One may not be at fault originally in provoking the difficulty, yet if his assailant withdraws and he pursues him, renewing the difficulty by his own fault, he will be denied the right to kill in self-defense: *Stillwell v. State*, 107 Ala. 16; *Parker v. State*, 88 Ala. 4. Illicit sexual intercourse with the wife of the party killed is such a provocation of a difficulty as to take away from the slayer the right of self-defense: *Dabney v. State*, 113 Ala. 38, 59 Am. St. Rep. 92. There are cases, however, where one who provokes the difficulty is justified in killing in self-defense, or perhaps it is more proper to say that certain acts will not amount to such a provocation as to deprive a party of the right to take life in self-defense: See *Patterson v. State*, 75 Miss. 670. The finding of a man in illicit intercourse with one's wife and provoking a difficulty by reason of that fact is not such a provocation as to deprive a party of the right to kill to save himself. In discussing such a situation, the court, in *State v. Cancienne*, 50 La. Ann. 847, said: "The [lower] court applied to the case the rule that the aggressor in a fight or difficulty cannot plead 'self-defense' in 'justification' of a homicide unless and until he had withdrawn from or attempted to withdraw

from it in good faith. It did not trace the trouble as to its origin farther back than the husband's firing the shots, and left the wife and the adulterer as being 'aggressors' in any way in the immediate difficulty entirely out of view. We think there is a difference between the case of a person who, having originally no immediate cause of provocation himself, should originate a difficulty which, in its after-phases, would lead to his killing the person whom he led into it, and that of a man who on entering into his own home is there brought to face a scene calculated to throw him into a condition of frenzy, under the influence of which he commits an act which, though not legally excusable, comes near the border line of justification. We think the situation was such as to justify us in referring the origin of the difficulty to the wife and her paramour as the 'aggressors,' sufficiently so as to open the door to submission to a jury of a plea of 'self-defense' when in one of the after-phases of the difficulty the husband's life had been placed in danger by one of them, and in order to save the same he had killed the party making the killing necessary. We think the rigor of the rule which the court refers to should be relaxed in a case of this character." In line with these cases it is held that where the deceased was assaulting a woman and the defendant interfered and provoked a quarrel with himself to protect the woman, such a provocation does not deprive the defendant of the right to kill in self-defense: *Brown v. Commonwealth* (Ky.), 51 S. W. Rep. 171. Killing is justifiable on the ground of necessary self-defense if the accused sought an interview with the deceased with no hostile intentions, but solely to demand settlement and payment of a claim: *Bonnard v. State*, 25 Tex. App. 173, 8 Am. St. Rep. 431. A mere preparation to commit the wrongful act, where there is no accompanying demonstration which indicates a wrongful purpose, is not such a provocation as to deprive one of the right of self-defense: *Menly v. State*, 26 Tex. App. 274, 8 Am. St. Rep. 477. Hence, where one seeks another even for the purpose of provoking a quarrel and arms himself for that purpose, his right of self-defense is not lost unless he does some act calculated to provoke the difficulty: *Mozee v. State* (Tex.), 51 S. W. Rep. 250; *Airhart v. State* (Tex.), 51 S. W. Rep. 214; *Thomas v. State* (Tex.), 51 S. W. Rep. 1109. In this last case it was said: "It is not a violation of law to seek a party for the purpose of provoking a difficulty. The offense is provoking a difficulty. We have held that a party can arm himself, and go where a person is, but, after reaching there, if he did not provoke the difficulty, or do some act or make some statement reasonably calculated to provoke the difficulty, he could not be convicted of provoking the difficulty." In *Shannon v. State*, 35 Tex. Cr. Rep. 2, 60 Am. St. Rep. 17, it was held that one person might speak to another about derogatory charges or statements made or circulated by such other against him without intending to provoke a difficulty; and, knowing that such other person is armed, he

may also arm himself, not to provoke a difficulty or to produce an occasion for injuring such other, but to act, if necessary, in self-defense, and if, in an attempt to adjust the trouble or reach an understanding without any provocation on his part, the insult or charge complained of is not only persisted in, but publicly repeated, and the complainant, roused to passion thereby, replies in terms equally insulting, and is immediately attacked, and finally kills his adversary in defense of his life, he is not guilty of any crime: See, further, *Smith v. State*, 75 Miss. 542. The limitations on the rule that one who provokes a difficulty is deprived of the benefit of self-defense were stated thus in *Foutch v. State*, 95 Tenn. 711: "It is true that such statements are to be found in many books, that if one be an 'aggressor' or be 'in fault' or 'provoke a difficulty,' he cannot rely upon the plea of self-defense; but such general statements are only true when taken in the limited sense in which they must be understood and with the qualifications with which judicial utterances that gave them existence have guarded their application. In order to make a man guilty of murder who is the 'aggressor' or 'in fault,' or who 'provokes a difficulty,' in which his adversary is killed, he must have provoked it with the intent to kill his adversary, or to do him great bodily harm, or to afford him a pretext for wreaking his malice upon his adversary." A man must, however, be free from fault in order to make the plea of self-defense a complete defense. The law recognizes both a perfect and an imperfect right of self-defense. In order to constitute the first, the party must be free from fault. But, as indicated by the quotation from this Tennessee case, an imperfect right exists though the defendant be not free from fault, if when he provoked the difficulty he had no intent to kill or to do great bodily harm. In *State v. Evans*, 128 Mo. 406, it was said that an assault voluntarily made with intent only to commit an ordinary battery is not made with malice aforethought, and will not deprive the assailant of his imperfect right of self-defense. The rule is well stated in the syllabus to *State v. Partlow*, 90 Mo. 608, 59 Am. Rep. 31: "If the slayer provoked the combat or produced the occasion, in order to have a pretext for killing his adversary, or doing him great bodily harm, the killing will be murder, no matter to what extremity he may have been reduced in the combat. But if he had no felonious intent, intending, for instance, an ordinary battery merely, the final killing in self-defense will be manslaughter only, the distinction being between the right of perfect and the right of imperfect self-defense." As was stated in *Reed v. State*, 11 Tex. App. 509, 40 Am. Rep. 795: "The right of self-defense, though inalienable, is and should to some extent be subordinated to rules of law, regulating its proper exercise, and so the law has wisely provided. It may be divided into two general classes, to wit, perfect and imperfect right of self-defense. A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity, and was

wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong—if he was violating or in the act of violating the law—and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself which was superinduced or created by his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong. . . . If he was engaged in the commission of a felony, and, to prevent its commission, the party seeing it or about to be injured thereby makes a violent assault upon him, calculated to produce death or serious bodily harm, and in resisting such attack he slay his assailant, the law would impute the original wrong to the homicide and make it murder. But if the original wrong was or would have been a misdemeanor, then the homicide growing out of or occasioned by it, though in self-defense from an assault made upon him, would be manslaughter under the law.”

Even where one is the aggressor so as to cut off his perfect right of self-defense, the right may be restored to him if he in good faith withdraws from the contest and subsequently is assailed by the other party. In commenting on this right of an aggressor, the court said in *Stoffer v. State*, 15 Ohio St. 47, 86 Am. Dec. 470: “While he remains in the conflict, to whatever extremity he may be reduced, he cannot be excused for taking the life of his antagonist to save his own. In such case it may be rightfully and truthfully said that he brought the necessity upon himself by his own criminal conduct. But when he has succeeded in wholly withdrawing himself from the contest, and that so palpably as at the same time to manifest his own good faith and to remove any just apprehension from his adversary, he is again remitted to his right of self-defense, and may make it effectual by opposing force to force, and when all other means have failed, may legally act upon the instinct of self-preservation, and save his own life by sacrificing the life of one who persists in endangering it”: See, to the same effect, *Smith v. State*, 75 Miss. 542; *Frank v. State*, 94 Wis. 211; *State v. Vaughan*, 141 Mo. 514; *Johnson v. State*, 58 Ark. 57; *State v. Cable*, 117 Mo. 380; *State v. Thompson*, 45 La. Ann. 969; *People v. Hite*, 8 Utah, 461; *People v. Simons*, 60 Cal. 72. This room for repentance and abandonment of an unlawful purpose always exists. But the repentance should be real, and the withdrawal from the combat actual. As the court said in *Aiken v. State*, 58 Ark. 544: “When a combatant, to abandon the conflict, and not to gain fresh strength or a new advantage, withdraws as far as he can, but the other will pursue him, if the taking of life becomes inevitable to save life, he may lawfully kill his pursuer. But a mere colorable withdrawal avails nothing.” The California cases have gone to the extent of holding that the intention to withdraw must be made known to one’s adversary in order that the right of self-defense may

be restored. And this is clearly the correct rule, since otherwise his adversary would have no means of knowing whether the danger which threatened him was removed or not. This doctrine was laid down in *People v. Button*, 106 Cal. 628, 46 Am. St. Rep. 259, where the court said: "In order for an assailant to justify the killing of his adversary, he must not only endeavor to really and in good faith withdraw from the combat, but he must make known his intentions to his adversary. His secret intentions to withdraw amount to nothing. They furnish no guide for his antagonist's future conduct. They indicate in no way that the assault may not be repeated, and afford no assurance to the party assailed that the need of defense is gone." In this case the assailant so injured the deceased as to deprive him of his reason, and he was thus rendered incapable of knowing that his assailant was withdrawing from the combat. The assailant could not notify the deceased of his withdrawal from the fight, for by his own unlawful act he had placed it out of his power to give him such notice. But, since such notice was necessary in order to restore to him the right of self-defense, he had forfeited the right and could not plead it as a defense. The court quoted this language approvingly from *State v. Smith*, 10 Nev. 106: "A man who assails another with a deadly weapon cannot kill his adversary in self-defense until he has fairly notified him by his conduct that he has abandoned the contest; and, if the circumstances are such that he cannot so notify him, it is his fault, and he must take the consequences." This rule was approved in *People v. Scott*, 123 Cal. 434, and *People v. Hecker*, 109 Cal. 451. From the case of *State v. Hatch*, 57 Kan. 420, 57 Am. St. Rep. 337, it might be thought that in Kansas a mere retreat to the wall before slaying another, and not an actual withdrawal from the combat, is all that is required in order to restore to one who has provoked the difficulty the right of self-defense. But that this is not the meaning of the opinion is seen from the case which is cited to sustain the proposition (*State v. Rogers*, 18 Kan. 78, 26 Am. Rep. 754), which supports the general rule requiring a withdrawal from the fight in order to entitle one to kill in self-defense. A mere retreat is not such a withdrawal as justifies a firing back and killing a pursuer: *Burris v. State*, 34 Tex. Cr. Rep. 387.

Defense of Other Persons.—One may exercise the right of self-defense not only to protect himself but to protect those whose relationship to him is near, such as husband and wife, parent and child, master and servant: *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370. In *Estep v. Commonwealth*, 86 Ky. 39, 9 Am. St. Rep. 260, where a man killed another who was assaulting his wife, the court said: "His wife having been unlawfully assaulted with a rock, and then being beaten in his own house, he had the unquestionable and unconditional right to go to her rescue and defense, and if by force or threats the deceased endeavored to prevent him, he had the

right to oppose force to force; and, if he at the time believed, and had reasonable grounds to believe, his wife was in immediate danger of losing her life or suffering great bodily harm, he had the right to use whatever reasonable means were necessary, or reasonably appeared to him to be necessary, to rescue or defend her, even to taking the life of the deceased." A father has the right to protect his daughter from an assault by her husband: *Campbell v. Commonwealth*, 88 Ky. 402, 21 Am. St. Rep. 348. One may take life in defense of his brother: *Shumate v. State*, 38 Tex. Cr. Rep. 266. If the accused knows that his brother, father, or other relative is the aggressor in the fight, so that the one endangered has forfeited the right to kill in self-defense unless he withdraws from the fight, then the accused is not justified in killing to prevent the death of his brother or other relative: *Ross v. Commonwealth (Ky.)*, 58 S. W. Rep. 4. But, if the accused is ignorant of the fact as to who is the aggressor, and when he comes upon the scene his father or other relative is in imminent danger of losing his life or of suffering great bodily harm, then he may kill his father's assailant, and such killing is justified as being done in self-defense. The fact that the father was the aggressor and had lost his right of self-defense is immaterial if unknown to the accused: *State v. Harper (Mo.)*, 51 S. W. Rep. 89; *State v. Hickam*, 95 Mo. 322, 6 Am. St. Rep. 54. This distinction, however, was not recognized in *Stanley v. Commonwealth*, 86 Ky. 440, 9 Am. St. Rep. 305, where it was held that a person cannot slay one who is about to kill his brother, unless the brother was without fault and would have had the same right to kill in his own defense. The reasoning in this case seems to be sound, and yet it places the defense of a relative on the same ground as the defense of a perfect stranger or of any other person who has been feloniously assaulted. The court in this case said: "This other person, in such a case, steps into the place of the assailed; and there attaches to him not only the rights, but also the responsibilities, of the one whose cause he espouses. If the life of such person be in immediate danger, and its protection requires life for life, or if such danger and necessity be reasonably apparent, then the volunteer may defend against it, even to the extent of taking life, provided the party in whose defense he acts was not in fault. He interferes at his peril, if the person slain was not in fault. In the language of Mr. Wharton, 'a person interposing, particularly if he be a stranger, should act with much caution.' This necessarily follows, because he takes the place of one of the combatants, and can only do for him what he had the right to do under the circumstances in defense of himself. Thus, if A unlawfully assaults B, endangering the latter's life, C has no right, because he may come upon the scene of conflict at a time when, during its progress, A is in danger, to kill B. This would be murder in C, just as it would in A. Any other rule could not be tolerated. The innocent cannot be sacrificed to save the guilty. This would

be paradoxical. A volunteer must not kill in behalf of one in fault. This would be what some writers have termed a 'negligent killing.' He may, however, do so for one not in fault, if the impending danger thus brought about be either actual or apparent. In other words, as the person not in fault may, if he believes, and has reasonable grounds to believe, that his life is in immediate danger, defend it to the extent of taking life, so another may act upon the like appearances as to such danger, and defend it for him to the same extent." Under the doctrine of this case one may exercise the right of self-defense in respect to a third person whether he is a relative or not, at least where it appears that a felony is about to be committed, and if the third person would have had the same right of self-defense himself. The one killing in such a case occupies the shoes of the third party, is entitled to his rights, and is subject to his disabilities. As was said by the court in *Crawford v. State*, 112 Ala. 1, quoting from Mr. Bishop: "Whatever one may do for himself he may do for another. The common case, indeed, is where a father, son, brother, servant, or the like protects by the stronger arm the feebler. But a guest in a house may defend the house; or the neighbors of the occupant may assemble for its defense; and, on the whole, though distinctions have been taken, and doubts expressed, the better view plainly is that one may do for another whatever the other may do for himself." The wording of this would not limit the defense of another to cases where death was threatened; it would be sufficient if great bodily harm was likely to result. And in *Smith v. State*, 106 Ga. 673, 71 Am. St. Rep. 286, it was directly held that the threatened injury need not amount to a felony where the assailant is endeavoring to enter a habitation to inflict injury on one of the inmates. In such a case a killing by a third person to protect the one threatened is justifiable self-defense.

Defense of Property.—The right to take life in defense of property exists within certain well-defined limits. We have seen that in the defense of one's self a person may kill to prevent great bodily injury to himself, and it is not necessary that the threatened injury should amount to a felony. In the defense of others, it is doubtful whether one may kill another unless the threatened injury amounts to a felony, except in the case of near relatives, although the tendency seems to be to hold that one may do for another whatever the other may do for himself. But, in defending property alone the injury threatened must be a felony in order to justify the taking of life. This is made the rule in California by section 197 of the Penal Code, with this exception, that where the attack is on one's habitation for the purpose of offering violence to anyone therein, a killing to prevent such violence is justified as being done in self-defense. But this is not a pure defense of property, but of the person of another. The rule at common law is the same as that enunciated by the code. In *People v. Flanagan*, 60 Cal. 2, 44 Am. Rep. 52, the court stated the rule thus: "It is equally true that

every person has a legal right, in defense of his property, to prevent the commission of a felony. For the purposes of defense and prevention everyone is entitled to use whatever force may be necessary, even to the extent of taking the life of a felonious aggressor, and a homicide committed under such circumstances is justifiable in law." The class of offenses to prevent which life could be taken was well stated in *State v. Moore*, 31 Conn. 479, 83 Am. Dec. 159: "The class of crimes in prevention of which a man may, if necessary, exercise his natural right to repel force by force to the taking of the life of the aggressor are felonies which are committed by violence and surprise; such as murder, robbery, burglary, arson, breaking a house in the daytime with intent to rob, sodomy, and rape. Blackstone says: 'Such homicide as is committed for the prevention of any forcible and atrocious crime is justifiable by the law of nature; and also by the law of England.' . . . 'A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors by violence and surprise to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either' . . . Neither of these writers specifies any other crimes than those enumerated, and both except from the list simple theft, and even an attempt to pick a pocket. No writer has enumerated breaking and entering a shop as one of that class of crimes. If it was technically burglary at common law, it would be included, but it is not. . . . Nor have we been referred to any case in England where it has been holden that life might be taken in defense of property in a shop. . . . We are satisfied, therefore, that by the strict letter of the common law a man may not take life in defense of property in a shop, and therefore may not justify a homicide committed by placing spring guns therein." See *Powers v. People*, 42 Ill. App. 427, where the attack was made on personal property. It is thus clear that the taking of life in defense of property is limited to cases where the crime contemplated amounts to a felony. And this rule is limited to felonies of a forcible nature: *Storey v. State*, 71 Ala. 329.

The case of *Gray v. Combs*, 7 J. J. Marsh. 478, 23 Am. Dec. 431, is only apparently in conflict with this rule. Here, the offense, breaking into a warehouse in the night-time to steal, would have been a felony if committed by a white person. But, since it was committed by a slave, it was only a misdemeanor. The court in holding that, even though committed by a slave, it was in effect a felony so far as the right of self-defense was concerned, said: "Though the robbery attempted in this case would only have been a misdemeanor in a slave, yet, in a white person it would have been a felony; and, therefore, though according to strict law it may not have been a justifiable means of prevention as against a slave, such being known to be the character of the thief, yet, in the absence of such knowledge, we would suppose a resort to such means justifiable as is permitted against the general, more numerous, and

worthier class of the community, and the circumstance of the calamity lighting upon one of the other class is to be taken as a misadventure. Whatever cavils may be entertained against such a course of reasoning, we should feel little hesitation in resorting to it, if necessary, to render slaves liable to all the same perils that whites incur in nocturnal depredations, and justifying as against them the same means of defense as against whites. The crime is of the same moral dye in each; and neither justice nor policy would allow the inculcation of a resort to the necessary means of prevention against its perpetration by one and not by the other merely from the circumstance that the offense, when committed by one, is designated in our code by a different name than when committed by the other." In Texas, by statute, the common-law rule seems to have been changed, permitting killing in defense of property whether the threatened injury amounts to a felony or not: See Tex. Pen. Code, art. 572.

Care must be taken to distinguish those cases in which, while preventing a threatened trespass on property, the life of the owner has been placed in danger and the committing of homicide became necessary to prevent the loss of life or great bodily harm. This is nothing more than a defense of one's person, and is not, strictly speaking, a defense of property: See *People v. Dann*, 53 Mich. 490, 51 Am. Rep. 151; *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200; *Parrish v. Commonwealth*, 81 Va. 1. In the first case cited, an execution purchaser went with a pistol to take possession of the goods, and the landowner was protecting the goods for another, to whom they had been sold. In protecting the goods the landowner's life was threatened, and he was compelled to kill the execution purchaser in self-defense, which he had a clear right to do. A person has no right to kill in defense of a mere trespass upon his property: *People v. Flanagan*, 60 Cal. 2, 44 Am. Rep. 52; *State v. Warren*, 1 Marv. (Del.) 487; *State v. Talley*, 9 Houst. 417; *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93. And, while one may order a trespasser to leave his land, he has no right to follow such trespasser "up until an attack was made upon him so fierce as to put him on self-defense": *Tiffany v. Commonwealth*, 121 Pa. St. 165, 6 Am. St. Rep. 775. The right to use sufficient force to expel a person from one's property does not seem to extend beyond the limits of the dwelling and the curtilage. This rule was laid down in *State v. Bartmess*, 33 Or. 110: "A man's house is regarded as his castle, to which he may flee for safety and protection, and which affords him and his family a 'city of refuge'; and if a person unlawfully intrude, the householder, after having warned him to depart, if he do not obey within a reasonable time, may employ sufficient force to expel him; but the immunity pertaining to the defense of a habitation does not extend beyond the limits of the dwelling and the customary outbuildings." The right of defense against trespassers seems to have been enlarged by the

Texas Penal Code, article 572, which reads in part as follows: "Homicide is justifiable also in the protection of the person or property against any other unlawful and violent attack besides those mentioned in the preceding article [felonies], and in such cases all other means must be resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack." Where one comes to accomplish the trespass in a peaceable manner, killing is not justifiable under this section: *McGlothlin v. State* (Tex.), 53 S. W. Rep. 869. But, where the intention is to accomplish the trespass or injury to the property by violence, if necessary, then killing may be resorted to: *Sims v. State*, 38 Tex. Cr. Rep. 637. In this case, if, while defending his property, the life of the accused became endangered, he could, at common law and under the law as it is generally administered, have killed in defense of his own life. But the Texas statute does not require one to wait until his life is threatened; the test is simply whether there is any way other than killing to prevent the violent injury to his property. If there is, he must resort to it; if not, the killing to prevent the injury is justifiable. As this case says, "the only criterion which the law erects is, if he was not able to prevent them destroying his property and taking possession of his land by other means than slaying, he had a right to slay." This rule, however, is not the general one, and does not exist in the absence of a statute conferring such a right of defense of property.

A person has a right to defend his habitation from assault, but it is only when such attack threatens the commission of a felony or great bodily harm to one of the inmates that life can be taken in defending it: *Powell v. State*, 101 Ga. 9, 65 Am. St. Rep. 277. The rule is correctly stated in the syllabus to *State v. Taylor*, 143 Mo. 150: "The maxim 'every man's house is his castle' does not mean that the owner of a dwelling-house has the right to take life because of trespass upon the dwelling-house alone, irrespective of the nature of the trespass. To justify the taking of the life of the trespasser, the trespass must be with a design to commit a felony thereon or therein, or upon its inmates. A mere civil trespass upon one's dwelling-house does not justify him in slaying the trespasser. The owner may resist such a trespass, opposing force against force, but he has no right to kill unless it becomes necessary to prevent a felonious destruction of property or the commission of a felony therein, or to defend himself against a felonious assault upon his person or that of some member of his family," and, it may be added, upon any of the inmates of the house. Of similar import is the case of *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200, where the question is elaborately discussed: See, further, *State v. Becker*, 9 Houst. 411; *Morgan v. Durfee*, 69 Mo. 469, 33 Am. Rep. 508; *State v. Peacock*, 40 Ohio St. 333; *People v. Coughlin*, 67 Mich. 466.

STATE v. MCGEE.

[55 SOUTH CAROLINA, 247.]

CRIMINAL LAW—INSTRUCTIONS—WHEN MADE.—A judge may charge a jury before the introduction of any evidence, and it is a part of his general charge, but he takes the chances that it will be applicable to the state of facts developed by the testimony.

WITNESSES.—THE CROSS-EXAMINATION OF A DEFENDANT IN A CRIMINAL CASE is not confined to matters brought out on direct examination, but may relate to any matter tending to develop the state's case.

WITNESSES—OBJECTIONS TO QUESTIONS—WAIVER.—A party does not waive his right to object to a question by failing to object to a similar question asked of another witness.

LIQUORS—DISPENSARY LAW—CONTRABAND.—Liquors purchased outside the state of South Carolina for personal use are not contraband simply because the packages in which they come do not have attached to them certificates as required by the dispensary law.

CRIMINAL LAW—VERDICT—JEOPARDY.—A verdict of guilty on counts 1 and 3 and disagreeing as to count 2 is a verdict of acquittal as to the second count if the verdict is not afterward set aside; but, if the verdict is set aside on appeal, the defendant cannot claim an acquittal under the second count.

Giles & Magill and Graydon & Graydon, for the appellant.

T. S. Sease, for the appellee.

248 GARY, J. The indictment under which the appellant was tried contained three counts—the first charging that he sold liquor, the second that he maintained a nuisance by keeping a place where persons habitually congregated for the purpose of drinking contraband liquor, and the third that he had in his possession contraband liquor.

The exceptions raise several questions; the first of which we will consider is, whether there was error on the part of his honor, the presiding judge, in charging the jury before any evidence was offered. No specific error is alleged, but it is contended that it is contrary to the custom and practice in this state, and in disregard of the rule that the charge must have some relevancy to the facts of the case. There is no inhibition against a judge **249** charging the jury before the evidence is introduced, but the preliminary charge must be construed with reference to the testimony thereafter introduced and as forming a part of the general charge. A proposition of law may be correct when construed with reference to one state of facts, and yet

may be misleading and erroneous when considered in connection with a different state of facts. When a judge charges the jury before the evidence is introduced, he takes the chances that it will be applicable to the state of facts developed by the testimony, and that, although it may state sound propositions of law, it may be misleading and erroneous, on account of being inapplicable to the facts of the particular case. The exceptions raising this question are overruled.

The next question which the court will consider is, whether the presiding judge erred in allowing the solicitor to ask, and in requiring the defendant upon cross-examination to answer certain questions tending to prove facts which, it is alleged, should have been proved by the state upon its examination in chief; in other words, whether the state had the right to develop its case upon cross-examination of the defendant, or was it confined in its cross-examination simply to the state of facts with reference to which the defendant testified. It was contended by the state that the defendant had waived the right to insist upon this objection by failing to object to similar testimony when another witness was examined. This was not a waiver, but it would have been a waiver if the party objecting had afterward himself introduced similar testimony, for, having received the benefit of such testimony, he would be estopped from objecting to its competency. The question raised by this exception has been decided several times by this court; and it is only necessary to refer to the cases of *Kibler v. McIlwain*, 16 S. C. 550, *Owens v. Gentry*, 30 S. C. 490, *Willoughby v. Northern R. R. Co.*, 32 S. C. 427, and *Sims v. Jones*, 43 S. C. 91, to show that the exception raising this question cannot be sustained.

²⁵⁰ The next question to be considered is, whether the presiding judge erred in charging the jury in said preliminary charge that all spirituous liquors are presumed to be contraband unless they have been purchased at a dispensary, or, if lawfully purchased elsewhere, have the certificates required by the dispensary law attached to them. In his general charge the presiding judge used the following language: "The third count charges that Randolph McGee has been guilty of storing and keeping in possession contraband liquors. 'Contraband' is the word used in the dispensary law, and is given a definite meaning with reference to that law, and it means any alcoholic liquors which have not been purchased at a dispensary, or, if imported for personal use, have not attached to the vessels in

which the liquors are poured—bottles, or baskets, or jugs, or boxes, or crates, or kegs, or the like—certificates which the state commissioner, under the law, is permitted to furnish, to throw the protection of the law around such liquors. I do charge you that the dispensary law allows citizens of the state to purchase outside of the state alcoholic, spirituous, intoxicating liquors for personal use; but, when they do so, they must comply with the section which permits that, and I shall read a part of it to you. Let me see what the citizen has to do who wishes to import for personal use such liquors: ‘Any person resident of this state, intending to import for personal use and consumption any spirituous, malt, vinous, or brewed liquors, shall first certify to the chemist of the South Carolina College the quantity and kind of liquor proposed to be imported, together with the name and place of business of the person, firm, or corporation from whom it is desired to purchase, accompanying such certificate with the statement that the proposed consignor has been requested to forward a sample of such liquor to the chemist at Columbia, South Carolina.’ But further on: ‘Any package of spirituous, malt, vinous, fermented, brewed, or other liquor containing alcohol, imported into this state, without such certificate, or any package containing liquor other than described in the certificate, ²⁵¹ thereto attached, or any package shipped by or to any person not named in such certificate, shall be seized and confiscated as provided, etc.’ Such liquor is contraband. Therefore, you are to inquire, from the testimony in this case, if any spirituous liquors were found in the possession, kept or possessed by Randolph McGee. If so, was it imported by him for personal use? If so, has he complied with the law in having the certificate which, as I have read to you, the law provides shall be attached to such liquors?” There was testimony tending to show that the appellant ordered whisky, and that it was for his own personal use. It does not appear from the testimony whether the liquor was shipped from a point within or without the limits of the state, but this was a question to be determined by the jury. It must be remembered that the appellant did not have the right to order the liquor from any place within the state, while he had the right to order from a point beyond the limits of the state. In construing the section of the dispensary law from which the presiding judge quotes, Mr. Justice White, in the case of *Vance v. Vandercook*, 170 U. S. 438, uses this language: “As the law directs that a sample of the liquor proposed to be

shipped shall be sent to the state officer in advance of the shipment, and as a prerequisite for obtaining permission to make a subsequent shipment, it is claimed in argument that this is an inspection law, passed for the purpose of guaranteeing the purity of the product to be shipped into the state for the use of a resident therein, and, therefore, it is but a valid manifestation of the police power of the state, exerted for the purposes of inspection only. But it is obvious that this argument is unsound, as the inspection of a sample sent in advance is not in the slightest degree an inspection of the goods subsequently shipped into the state. The sample may be one thing, and the merchandise which afterward comes in another. It is hence beyond reason to say that the law provides for an inspection of the goods shipped into the state from other states, when, in fact, it exacts no inspection whatever. Conceding, without deciding, the power ²⁵² of the state, where it has placed the control of the sale of all liquor within the state in charge of its own officers, to provide an inspection of liquors shipped into a state, by residents of other states, for use by residents within the state, it is clear that such a law, to be valid, must not substantially hamper or burden the constitutional right on the one hand to make and on the other to receive such shipment. A law of this nature must at least provide for some inspection of the article to justify its being an inspection law. The power of the state to inspect an article, protected by the guaranties of the constitution, because intended only for use and which cannot be sold, is, in the nature of things, restrained by limitations arising from the constitutional provisions, of a more restricted nature than would be the power to inspect articles intended for sale within the state. The greater harm and abuse which might arise in the latter case suggests a wider power than is incident to the other." The charge of the presiding judge was in conflict with the construction of this section by the supreme court of the United States, and the exceptions raising this question must be sustained.

The next question that will be considered is, whether there was error in charging the jury that they had the right to find the defendant guilty under one or two of the counts in the indictment, and to disagree as to the other one or two. The case contains the following statement: "After the jury had been in their room for some time, the foreman came into the courtroom and asked the presiding judge if the jury had the right to find the defendant guilty on one or two of the counts

in the indictment, and make a mistrial as to the other or others, and the presiding judge told them they might do so. He subsequently had the jury brought into the courtroom, and repeated to them what he had said to the foreman." The jury finally came into the courtroom with the following verdict: "We find Randolph McGee guilty under the first and third counts; we disagree as to the second count." In the American and English Encyclopedia of Law, volume 28, page 375, the ²⁵³ law is thus correctly stated: "A partial verdict is one by which the jury, in a criminal case, acquit the defendant as to part of the accusation, and find him guilty of the residue. The conviction may be on one of several counts, each charging a distinct offense, with a discharge upon the others, either in express terms or by silence, which is regarded as a constructive acquittal." So that if the jury had simply said, "We find Randolph McGee guilty under the first and third counts," this would have been a complete, certain, and valid verdict as to all the counts in the indictment. Let us, then, see what was the effect of the additional words, "We disagree as to the second count." In the case of *City Council v. Weikman*, 2 Spear, 371, the court says: "It is only where a verdict, before certain and valid according to a fair construction, has been cumbered by the addition of useless matter, not qualifying the previous meaning, that the additional can be rejected as surplusage." The additional words, "We disagree as to the second count," did not qualify the previous meaning, and are, therefore, to be regarded as surplusage. A verdict finding the defendant guilty under the first and third counts would necessarily have presupposed one of two things, to wit, either that the jury had found him not guilty under the second count or that they had disagreed as to that count, but were willing to render a verdict of guilty as to two counts, the practical effect of which, in law, would be to acquit him on the second count. When a verdict is entered which is not afterward set aside at the instance of the defendant, and the jury discharged from the further consideration of the case, its effect is to acquit the defendant of all the counts in the indictment, although the jury may have found him guilty on a less number than the whole of the counts; otherwise, he would be subject for the same offense to be put in jeopardy of life or liberty a second time. Jurors who are unwilling to acquit a defendant on any of the counts in the indictment should refuse to agree except upon a general verdict of guilty. As the verdict in this case must be set aside, and in

order that the court may ²⁵⁴ not be misunderstood, we take occasion to say that the defendant cannot claim an acquittal under the second count: *State v. Commissioners*, 3 Hill (S. C.) 239.

The defendant also excepts to the ruling of the presiding judge in refusing to continue the case; but as the case must be remanded for a new trial, that is no longer a practical question, and those exceptions will not be considered, especially as the rule in such cases is already well settled in this state.

It is the judgment of this court that the judgment of the circuit court be reversed and the case remanded for a new trial.

Pope and Jones, JJ. Since the decision in *State v. Holleyman*, 55 S. C. 207, we feel bound to concur.

INSTRUCTIONS—TIME TO GIVE.—There is no law prescribing any particular time at which instructions in criminal cases shall be given: See extended note to *Strohn v. Detroit etc. R. R. Co.*, 99 Am. Dec. 126.

WITNESSES—CROSS-EXAMINATION OF THE ACCUSED.—When a defendant in a criminal case becomes a witness in his own behalf, it is within the discretion of the court to allow him to be cross-examined on the whole case, although in some jurisdictions he can be cross-examined only as to matters referred to by him in his examination in chief: See extended note to *State v. Duncan*, 38 Am. St. Rep. 895, 896. See, too, *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50.

TRIAL—FORMER JEOPARDY.—If an indictment contains several counts, the defendant on obtaining a new trial can be tried again only on those counts on which he was convicted at the first trial, and cannot be retried on those on which he was acquitted. But this rule has no application when the several counts charge but one offense: See extended note to *Commonwealth v. Arnold*, 4 Am. St. Rep. 119.

STATE v. LANGFORD.

[5 SOUTH CAROLINA, 322.]

LARCENY—AT COMMON LAW, larceny could not be committed of a dog.

LARCENY—DOGS.—In a state where dogs are taxed as personal property, they are chattels within the meaning of a statute defining larceny, and are therefore the subject of larceny.

BURGLARY.—IN INDICTMENTS for burglary with intent to commit larceny, it is not necessary to specify the particular goods and chattels the defendant intended to steal.

PLEADING.—THE SUFFICIENCY OF A COUNT must be determined by its own allegations, without aid from another count.

T. S. Sease, Eugene S. Blease, and Assistant Attorney General U. X. Gunter, for the appellant.

Johnston & Welch, for the appellee.

³²³ JONES, J. In this case the state appeals from an order quashing an indictment, containing two counts—one charging burglary of a doghouse within two hundred yards of and appurtenant to the dwelling of Mary Nichols, with ³²⁴ intent to steal, etc., the goods and chattels of Mary Nichols in the said doghouse; the other count charging larceny of a dog of the value of ten dollars of the proper goods and chattels of Mary Nichols, then and there being found in the said doghouse. In sustaining the demurrer to the indictment the circuit court held: 1. That larceny cannot be committed of a dog; 2. That the intent to steal goods and chattels, charged in the first count, necessarily implies the stealing of a dog, because from a doghouse, and that the offense of burglary is, therefore, not charged; 3. That it is not compound larceny to steal from a doghouse, as alleged in the second count.

1. The first and principal question presented is whether a dog is the subject of larceny. By the old common law, larceny could not be committed of a dog. The reasons assigned for this were the baseness of the nature of such creature; that it was kept for mere whim and pleasure; that, being unfit for food, it was of no intrinsic value; that the penalty for the felony of larceny was too severe to apply for the stealing of so contemptible a creature. By the statute of 10 George III, chapter 18 (George III was fond of stag hunting), the taking and carrying away of a dog was made punishable, but not as larceny. Under the reasoning satisfactory at that day, it was larceny to steal a tame hawk, but not larceny to steal a tame dog, although it was larceny to steal the hide of a dead dog. Yet by the common law dogs were held to be such property as would sustain an action of trover for their recovery. Civil remedies were permitted for injury to or loss of dogs, and they would go to the executors and administrators as property. The reason for the outlawry of dogs in favor of thieves can hardly be regarded as persuasive at this day and here, and such crude application of the principles of the common law must yield to common sense. The fitness of an animal for food is not the only test of its value to mankind; its capacity for useful service in other ways is often the real test of value. Nor is the fact that an animal is kept for the whim and ³²⁵ pleasure of its owner any sort of

reason for excluding it from the law of larceny as a thing of no value, for amusement has its valuable uses to man. Neither is it just to say of the dog that its nature is so base as to render it unworthy of protection as absolute property, for Baron Cuvier says the dog is the "completest, the most singular, and the most useful conquest ever made by man." When we are told that the Greeks and Romans employed dogs in war, armed with spiked collars, and that Corinth was saved by war dogs which attacked and checked the enemy until the sleeping garrison were aroused, we better understand Shakespeare's Antony when he said, "Cry havoc, and let slip the dogs of war." We should not let our contempt for sheep killing dogs and our dread of hydrophobia do injustice to the noble Newfoundland, that braves the water to rescue the drowning child; to the Esquimaux dog, the burden bearer of the Arctic regions; to the sheep dog, that guards the shepherd's flocks and makes sheep raising possible in some countries; to the St. Bernard dog, trained to rescue travelers lost or buried in the snows of the Alps; to the swift and docile greyhound; to the package carrying spaniel; to the sagacious setters and pointers, through whose eager aid our tables are supplied with the game of the season; to the fleet fox hounds, whose music when opening on the fleeing fox is sweet to many ears; to the faithful watch dog, whose honest bark, as Byron says, bays "deep-mouthed welcome as we draw near home"; to the rat exterminating terrier; to the wakeful fice, which the burglar dreads more than he does the sleeping master; to even the pug, whose very ugliness inspires the adoration of the mistress; to the brag 'possum and coon dog, for which the owner will fight if imposed upon; and lastly, to the pet dog, the playmate of the American boy, to say nothing of the "yaller dog," that defies legislatures. Of all animals the dog is most domestic. Its intelligence, docility, and devotion make it the servant, the companion, and the faithful friend of man. The raising and training of dogs are now pursued by many as a business, large sums of money are invested in ³²⁶ them, and they are bought and sold as other property. In this state, by statute, dogs are and have long been taxed as personal property, according to value and for revenue. As stated in *Salley v. Manchester etc. R. R.*, 54 S. C. 484, 71 Am. St. Rep. 810: "What the law taxes as personal property it will protect as such." This legislation is potent in two ways: 1. If the common-law rule, notwithstanding the fallacy of the reasoning upon which it is based, as applied to

present conditions, should be held of force in this state, in the absence of modification by statute, then the statute taxing dogs as personal property ad valorem and for revenue is a modification of the common-law rule; 2. It brings dogs as personal property and things of value within the meaning of "chattels" in our state as to simple larceny (see Criminal Code, sec. 160) the term "chattel" including all kinds of property except freehold, or things parcel thereof, and perhaps choses in action. In the case of *Ward v. State*, 48 Ala. 161, 17 Am. Rep. 31, holding that there is no such property in dogs as makes them the subject of larceny, the court was influenced by the absence of any statute modifying the common law, and the fact that dogs were not taxed as other property in that state. Likewise, in the case of *State v. Doe*, 79 Ind. 9, 41 Am. Rep. 599, the court, while holding dogs not the subject of larceny, said: "If dogs were taxed in this state [Indiana] as other property for revenue purposes, it would be a strong circumstance to show an intent on the part of the legislature to abrogate the common-law rule, and make them the subjects of larceny like any other personal property." In the case of *Mullaly v. People*, 86 N. Y. 365, a strong case in support of the view of this court, the court said: "It can scarcely be supposed that the legislature meant to regard dogs as property for purposes of taxation, and yet leave them without protection from thieves." Sustaining our conclusion, among others are the following cases: *State v. Brown*, 8 Baxt. 53, 40 Am. Rep. 81; *Hamby v. Sampson*, 105 Iowa, 112, 67 Am. St. Rep. 285, 40 L. R. Ann. 508, and a very able and exhaustive note on property rights in dogs, beginning at page 503.

³²⁷ 2. The circuit court also erred in holding "that the intent to steal goods and chattels, charged in the first count, necessarily implies the stealing of a dog, because from a doghouse." The first count did not charge intent to steal a dog, but intent to steal the goods and chattels of the prosecutrix in said doghouse. It is not a necessary inference that no chattel other than a dog could be in a doghouse, as there might have been other chattels there, such, for example, as collar and chain, block and chain, vessel for food and water, etc., or, indeed, any other chattel the proprietor might see fit to place therein. The first count could, therefore, be sustained as a count for burglary, without reference to the question whether a dog is the subject of larceny. In indictments for burglary with intent to commit larceny, it is not necessary to specify the particular

goods and chattels the defendant intended to steal: 3 Ency. of Pl. & Pr. 776. It is urged against this that such want or specification would prevent the plea of former acquittal or conviction; but not so, for such plea is available if the same burglarious breaking and entering is the essential ingredient in both charges.

3. In reference to the second count, we think the circuit court correctly held that it failed to charge a compound larceny. In alleging a larceny from "said doghouse," this count did not allege that the doghouse was appurtenant to and within two hundred yards of the dwelling-house. This was alleged in the first count, but the rule is that the sufficiency of each count must be determined by its own allegations, without aid from another count: *State v. Johnson*, 45 S. C. 483. But, nevertheless, it was error to quash the second count, because it was good as a count for simple larceny, and the court of general sessions has concurrent jurisdiction in all cases of larceny triable by magistrate: See Const., art. 5, sec. 18, applied in reference to larceny of livestock, in the case of *State v. Crosby*, 51 S. C. 249.

328 The judgment of the circuit court is reversed, and the case remanded for further proceedings.

LARCENY—DOGS.—At common law it was not larceny to steal a dog; but, under a statute making it a crime to steal any money, goods, or chattels of another, one may be guilty of larceny in stealing a dog. It is a chattel: *Hamby v. Samson*, 105 Iowa, 112, 67 Am. St. Rep. 285.

DOGS. PROPERTY IN—EFFECT OF TAXATION.—The authorities are in conflict as to whether statutes making dogs the subject of taxation raise them to the dignity of property in its fullest sense: See monographic note to *Hamby v. Samson*, 67 Am. St. Rep. 290. 291.

BURGLARY.—IN AN INDICTMENT for burglary it is not necessary to describe the goods which it is alleged were intended to be taken: See monographic note to *People v. Richards*, 2 Am. St. Rep. 394.

STATE v. BOUKNIGHT.

[55 SOUTH CAROLINA, 353.]

TRIAL—INDICTMENT—ELECTION OF COUNTS.—Where one count of an indictment alleges that the offense was committed in the night-time, and another count alleges that the same offense was committed in the daytime, the prosecution may be compelled to elect on which count they will go to trial.

TRIAL—ELECTION—DISCRETION.—It is within the discretion of a trial judge to require a party to elect upon which count he will go to trial.

APPEALABLE ORDER—QUASHING INDICTMENT.—An order granting a motion to quash an indictment is a final order, and may be appealed from.

PLEADING—INDICTMENT.—IN ALLEGING a statutory offense only such exceptions and provisos need be negatived as are descriptive of the offense.

Assistant Attorney General U. X. Gunter, for the appellant.

Tompkins & Wells, for the appellee.

354 McIVER, C. J. The indictment in this case contained three counts—the first charging the defendant with feloniously breaking and entering, on the 13th of March, 1898, in the night-time, the weather-house of one Eli Kinard, with intent the goods and chattels of Eli Kinard and Jake Kinard, in the said weather-house then and there being found, to unlawfully steal, take, and carry away; second, charging the defendant with the simple larceny of certain goods and chattels of Eli Kinard and Jake Kinard; and the third count was in all respects similar to the first count, except that the defendant was charged with breaking and entering the said weather-house in the daytime. All of these counts concluded *contra formam statuti et contra pacem*. Before the jury was sworn, defendant moved that the solicitor be required to elect upon which of the two counts for housebreaking (the first and the third) he would go to trial. This motion was granted by his honor, Judge Ernest Gary, notwithstanding the statement made by the solicitor that both counts were based upon the same transaction, and were put in to meet the proof. The solicitor then elected to go to trial on the first count. Thereupon the circuit **355** judge asked counsel for defendant if there was a motion to quash the first count, upon the ground that there was no allegation therein that “the breaking and entering of which house would not constitute burglary,” to which defendant’s counsel replied that no such motion had been made, but he

would then make the motion to quash the first count in the indictment. The motion to quash was granted, whereupon the solicitor gave notice of appeal, and further proceedings in the case were suspended pending such appeal. The solicitor bases his appeal upon two exceptions: 1. That there was error on the part of the circuit judge in requiring him to elect upon which of the two counts—the first and third—he would go to trial; 2. Because of error in quashing the first count in the indictment.

The indictment is confessedly framed under the Criminal Statutes, section 142 (2 Rev. Stats., 314), which reads as follows: "Every person who shall break and enter, or who shall break with intent to enter, in the daytime, any dwelling-house or other house, or who shall break and enter, or shall break with intent to enter, in the night-time, any house, the breaking and entering of which would not constitute burglary, with intent to commit a felony, or other crime of a lesser grade, shall be held guilty of a felony, and punishable, at the discretion of the court, by imprisonment in the county jail or penitentiary for a term not exceeding one year." This section, which is but a reproduction in totidem verbis of the act of 1887 (19 Stats. 792) creates two distinct and different offenses, though both belong to the class of felonies, and are punishable in the same way: 1. It is made a felony to break and enter, or to break with intent to enter, in the daytime, any house, whether it be a dwelling-house or a house of any other character, with intent to commit a felony, or other crime of a lesser grade; 2. It is likewise made a felony to break and enter, or to break with intent to enter, in the night-time, any house, except a dwelling-house or house within the curtilage of the dwelling-house, or any house within two hundred yards of the ³⁵⁰ dwelling-house and appurtenant thereto. It is obvious that the second of these felonies is charged in the first count of the indictment, and that in the third count the first of these felonies is charged; for in the first count the charge is that the defendant broke and entered the house therein specified, in the night-time, while the charge in the third count is that the defendant broke and entered the house therein specified in the daytime. This being so, it is clear that there was no error on the part of the circuit judge in requiring the solicitor to elect upon which of these two counts he would go to trial; for although the two offenses charged belonged to the same class and subjected the offender to the same punishment, yet the allegation is that these two offenses were

committed at different times—one in the daytime and the other in the night-time. Besides, the power of the circuit judge to require the solicitor to elect is a power to be exercised at his discretion: 10 Ency. of Pl. & Pr. 546-548, 551; *State v. Nelson*, 14 Rich. 169, 94 Am. Dec. 130; *State v. Scott*, 15 S. C. 435. Now as it is very certain that there was no abuse of discretion in this case, and, on the contrary, that his discretion was properly exercised, the first ground upon which the solicitor imputes error to the circuit judge cannot be sustained.

The next question is, whether there was error in granting the motion to quash the first count in the indictment. While this court has held in the case of *State v. Burbage*, 51 S. C. 284, that an order refusing a motion to quash is not appealable until after final judgment, especially where the points raised by the motion to quash may, after final judgment, be raised by a motion in arrest of judgment, yet the reasons there stated for such ruling do not apply to a case where the motion to quash the indictment has been granted; and as an order quashing an indictment puts an end to further proceedings under such indictment, and may, in some cases, as, for example, in cases where the statute of limitations may be applied, put a final end to the prosecution, the ruling in the case last cited cannot be applied ³⁵⁷ to an appeal from an order granting a motion to quash an indictment, for the reason that no other opportunity may be afforded of reviewing the action of the circuit judge in granting the motion. It follows, therefore, that the order appealed from is appealable: See *State v. Young*, 30 S. C. 399.

The inquiry, therefore, is whether there was error in quashing the first count in the indictment. The motion was granted upon the ground that this count did not contain the following words, found in the statute, "the breaking and entering of which would not constitute burglary," following immediately after the words "any house," in that clause of the statute creating the second felony above spoken of. So that the question is whether those words are necessary to an indictment for such felony. Those words do not describe any necessary ingredient in the offense charged, but are intended simply to express an exception to the general terms, "any house," immediately preceding; and the language evidently means that the breaking or entering, in the night-time, of any house, except a house the breaking and entering of which, in the night-time, would constitute the offense of burglary, provided for in sections 141 and

143 of the Criminal Statutes, should be a felony. The essential elements of the second felony created by section 142 are: 1. The breaking and entering, or the breaking with intent to enter, in the night-time, of any house, except one the breaking and entering of which, in the night-time, would constitute the offense of burglary, provided for by sections 141 and 143; 2. The intent to commit a felony or other crime of lesser grade. So that the practical inquiry in this case is whether the failure to allege that the house charged to have been broken and entered did not fall within the exception mentioned in the statute is fatal; or, to state it more concisely, whether it was necessary to negative the exceptions mentioned in the statute. In 10 Encyclopedia of Pleading and Practice, 495, we find the following as to exceptions and provisos in statutes creating criminal offenses: "The rule usually announced is ³⁵⁸ that exceptions and provisos in the enacting clause of the statute must be negatived, and such as are not in the enacting clause need not be negatived, the latter being merely matters of defense. But while it is undoubtedly true that exceptions which are not in the enacting clause of a statute, as descriptive of the offense, need not be negatived, and those which are in the enacting clause, as descriptive of the offense, must be negatived, the more accurate rule, deducible from the authorities is that only such exceptions and provisos need be negatived as are descriptive of the offense, without reference to the position of the exception or proviso." This statement of the rule is not only supported by a number of cases cited in the notes, but, as it seems to us, is better supported by reason and common sense, and is in accordance with the spirit of the act of 1887 (19 Stats. 829), passed for the purpose of doing away with purely technical objections to indictments. If, therefore, the language of the exception, found in any part of the statute, must be regarded as descriptive of the offense created by such statute, then such exception must be negatived; but if it cannot properly be so regarded, then it becomes a matter of defense, and need not be negatived. Now, as we have seen, the language of the exception constitutes no part of the description of the offense intended to be created, and hence need not be negatived. But if we are in error in this view, it does not follow that the omission of the words, "the breaking and entering of which would not constitute burglary," from the first count of the indictment, was necessarily fatal to that count. For even if the exception mentioned in the statute is not, in express terms, negatived, yet

if the allegations found in the indictment necessarily imply such a negation, that will be sufficient. For, as is said in 10 American and English Encyclopedia of Law, at page 581, upon the authority of *State v. Price*, 12 Gill & J. 260, 37 Am. Dec. 81, "the rule that the indictment must negative exceptions in statutes does not apply in a case where the charge is [evidently a misprint for "as"] preferred *ex natura rei*, conclusively imports a negative of the ³⁵⁹ exceptions"—which case is cited with approval in 10 Encyclopedia of Pleading and Practice, at page 496. See, also, to same effect, *State v. Reynolds*, 2 Nott & McC. 365, which was an indictment under the act of 1816, prohibiting any person or persons from playing at any game with cards, etc., except whist and other specified games, when there is no betting on said games, where Nott, J., in delivering the opinion of the court, uses this language: "The indictment ought, therefore, to have stated that the persons so playing were betting on the game, or it should have negatived the exceptions, or *in some other manner set out the facts*, so that it might appear that the defendant had committed some one of the offenses prohibited by the act" (*italics ours*). Now, in this case the allegation in the first count of the indictment is that the defendant feloniously broke and entered "the weather-house" of one Eli Kinard, which conclusively shows that the house which the defendant is charged with having broken and entered was not a house "the breaking and entering of which would not constitute burglary." The test of this is that if defendant had been charged with burglary under an indictment containing language precisely like that found in the first count of the indictment now before us, he could not possibly have been legally convicted. Why? Because the house was not such a house as that burglary could have been committed therein. It seems to us, therefore, that the exception in the statute was as completely negatived as if the most express terms of negation had been used.

The judgment of this court is, that the order requiring the solicitor to elect upon which count he would go to trial be affirmed, but that the order quashing the first count in the indictment be reversed, and the case remanded for trial.

INDICTMENT—ELECTION BETWEEN COUNTS.—If an indictment contains two counts, the first charging burglary to have been committed in the daytime and the second at night, the court should refuse to compel the prosecution to elect upon which count it will proceed. But in a case of this kind it is within the discretion of the court to require such election: See extended note to *State v.*

Bell, 92 Am. Dec. 662. Compare *State v. Nelson*, 14 Rich. 169, 94 Am. Dec. 130; note to *State v. Bell*, 92 Am. Dec. 663, 665.

THE RULE THAT AN INDIOTMENT MUST NEGATIVE exceptions in a statute does not apply to a case where the charge preferred *ex natura rei* conclusively imports a negative of the exceptions: *State v. Price*, 12 Gill & J. 260, 37 Am. Dec. 81.

A MOTION TO QUASH AN INDICTMENT is addressed to the sound discretion of the court, and its refusal is no ground for exception: *Commonwealth v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596; *State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270. See, too, *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 411.

STEELE v. SOUTHERN RAILWAY.

[55 SOUTH CAROLINA, 389.]

RAILROADS—PRESUMPTION OF NEGLIGENCE FROM INJURY.—The injury of a passenger on a railroad is *prima facie* evidence of negligence in the management of the road, which evidence the railroad company is bound to rebut.

RAILROADS—DUTY TO PASSENGER ON FREIGHT TRAIN.—A carrier of a passenger on a freight train is bound to exercise the highest degree of care consistent with the practical and efficient use of the train for its primary purpose of transporting freight, and a passenger thereon assumes such inconvenience and risks as usually attend the operation of such train.

B. L. Abney and John P. Thomas, Jr., for the appellant.

Moore & Thompson, for the appellee.

390 JONES, J. The judgment of the circuit court in this case awarded plaintiff two hundred dollars as damages for injuries received while traveling as a passenger in the "caboose-car" of defendant's freight train. While this train was on its way from Ridgeway to Columbia, August 5, 1898, the caboose and another car became detached from the remainder of the train, and then overtook and collided with the rear end of the forward part of the train, throwing plaintiff from his seat across the caboose, inflicting injury. The collision was of such force as to break the couplers of the two cars that had been detached from the rest of the train, and knock one pair of trucks of the caboose from off its center plate. The appeal presents two general questions: 1. The rule as to presumption of negligence in a case like this; 2. The degree of care to be exercised by a carrier of passengers on a freight train, and the risks assumed by such passengers.

1. The circuit court refused to charge appellant's request ³⁹¹ as follows: "The burden is upon the plaintiff to show that the railroad in this case was negligent. Negligence must rest upon the actual facts as shown by the evidence, and must not depend upon conjecture or surmise; and, in the case of a railroad accident, where the evidence discloses the facts and circumstances thereof, there is no presumption of negligence." The court charged as follows: "Where a passenger is injured on a railroad, there is, from that fact alone, prima facie evidence of neglect in the management of the road, which evidence the railroad company is bound to rebut." This refusal to charge, and charge, is basis of the first and second exceptions. In reference to this subject, the circuit court explicitly charged the jury that the presumption was rebuttable, and that the jury must determine the question of negligence from the facts and circumstances of the case. It will be noted that the charge complained of is in the exact language quoted from the case of *Hegeman v. Western R. R. Co.*, 16 Barb. 353, quoted by Judge O'Neill with entire approval in *Zemp v. Wilmington etc. R. R. Co.*, 9 Rich. 89, 64 Am. Dec. 763, wherein it was held that proof that a passenger has been injured on a railroad is prima facie evidence of neglect. This learned judge, referring to *Danner v. South Carolina R. R. Co.*, 4 Rich. 334, 55 Am. Dec. 678, said: "Surely, if a prima facie case of negligence is made out by showing the fact that stock was killed or injured on the railroad, much more ought the same result to follow from a passenger being injured. For, as to him, the company undertakes to carry safely as far as human care and foresight will go. This liability can only be discharged by showing that all reasonable skill and diligence have been employed: *McClenaghan v. Brock*, 5 Rich. 17." While this rule is regarded as too broad by some courts of high authority, we believe it is sustained by reason and the weight of authority: See cases collated in note, 5 Ency. of Law, 623. The reasons for the rule are: 1. The contractual relation between the carrier and passenger, by which it is incumbent on the carrier to transport with safety; hence the burden of explaining failure of performance should be on the carrier. ³⁹² 2. The cause of the accident, if not exclusively within the knowledge of the carrier, is usually better known to the carrier, and this superior knowledge makes it just that the carrier should explain. 3. Injury to a passenger by a carrier is something that does not usually happen when the carrier is exercising due care; hence the fact of injury affords a

presumption that such care is wanting. But if it should be granted that, as stated in 5 Encyclopedia of Law, 624, "the better rule is, that the presumption does not arise from mere proof of an injury to a passenger, but must be limited to injuries caused by some act on the part of the servants of the carrier, which may be either acts of omission or commission, or from defects in the instrumentalities of transportation," then the circuit court committed no error on this point. By the pleadings and the undisputed facts in this case, plaintiff was thrown from his seat and injured by a violent collision between portions of the train which in some way became uncoupled while running. By all the authorities, proof of injury under such circumstances would raise a presumption of negligence, casting upon the carrier the burden of explaining that the accident happened from a cause for which it is not responsible, or that it was not due to its negligence.

2. As to the degree of care to be exercised by the carrier to a passenger on a freight train and the risks assumed by such a passenger. The circuit court refused to charge the following requests by the defendant: "2. In boarding a freight train, passengers assume the increased risks and diminution of comfort incident thereto, and, if the train is managed with the care usual and requisite for such trains, it is all that those who voluntarily board them have a right to expect; 3. A passenger upon a freight train is presumed to assume the risks of jolts and jars not caused by the negligence of the railroad employes; and in this case, if you find that it was such a jolt or jar which threw the plaintiff from his seat, he cannot recover in this action." On this subject the court charged as follows: "Now, while they [carriers] are not insurers of passengers, ³⁹³ yet the law enjoins upon them the highest degree of care in the management and conduct of their cars to ensure the safety of the passenger. Now, whether he boards a freight train, mixed train, or passenger train does not make any difference, so far as the liability of the carrier is concerned; his contract is fixed when he receives the passenger's money—whether he receives him on a freight train, passenger train, or mixed train, matters not. He assumes the obligation as soon as he takes the passenger's fare to carry him, transport him to his point of destination, with that degree of care which the law contemplates he should exercise; and he would not be permitted to excuse himself from care by reason of the fact that he was operating a freight train at that time. Now, the law does not compel a

common carrier to convey passengers on freight trains—that is optional with them; but, if they undertake to do it, the law then fixes upon them that degree of care that attaches to common carriers of passengers; and it says, in the transportation of a passenger, the carrier must use the highest degree of skill and care in so conducting his carriage or his train of cars as to not injure the passenger.” We think the general charge above should have been modified or qualified substantially in accordance with the above requests to charge. A carrier of a passenger on a freight train is bound to exercise the highest degree of care consistent with the practical and efficient use of the train for its primary purpose of transporting freight, and a passenger thereon assumes such inconvenience and risks as usually attend the operation of such train with all reasonable skill and caution as a freight train. Whatever the mode of conveyance, whether by passenger, mixed, or freight train, the carrier is liable for any negligence resulting in injury to a passenger, and in that sense the law requires the highest degree of care in all cases, but, in applying this rule, the jury should take notice of the particular mode of conveyance. For illustration, in the management of a regular passenger train, the highest degree of care may require the use of a bell cord, or a brakeman on each car, or automatic brakes,³⁹⁴ but in the management of a freight train the same degree of care may not require these things. To require of freight trains all the safeguards against danger which is required of a passenger train might render the operation of freight trains impracticable in many localities. These views are supported by the following authorities: *Chicago etc. Ry. Co. v. Arnol*, 144 Ill. 261; *Olds v. New York etc. R. R. Co.*, 172 Mass. 73; *Dunn v. Grand Trunk Ry. Co.*, 58 Me. 187, 4 Am. Rep. 272; *Wallace v. Western North Carolina R. R. Co.*, 98 N. C. 494, 2 Am. St. Rep. 348; *Crine v. East Tennessee R. R. Co.*, 84 Ga. 651; *McGee v. Missouri Pac. Ry. Co.*, 92 Mo. 208, 1 Am. St. Rep. 709; *Delaware etc. Ry. Co. v. Ashley*, 67 Fed. Rep. 209; 14 C. C. A. 373; *Indianapolis etc. Ry. Co. v. Horst*, 93 U. S. 291; *Louisville etc. Ry. Co. v. Bisch*, 120 Ind. 549. There is force in the view that since the undisputed fact is that the injury resulted from the violent colliding of detached portions of the train, while moving on its journey, such a collision, as matter of law, is not usually and reasonably incident to the management with proper skill and caution of a freight train, having due regard to its primary uses and purposes, and so was not one of the risks assumed by the passenger, and, inas-

much as the court left it to the jury to determine the issue as to negligence under other instructions, that negligence is the want of "the care and caution that would be exercised by a reasonable and prudent person under the circumstances of the situation," the failure to instruct the jury as requested was not prejudicial. But as we cannot be sure from the brief before us that the jury may not have found the issue of negligence against defendant because of the absence of some safeguard against danger which the highest degree of care would require in the management of a regular passenger train, we think there should be a new trial, under unequivocal instructions in accordance with the views herein announced.

The judgment of the circuit is reversed, and the case remanded for a new trial.

RAILROADS—PRESUMPTION OF NEGLIGENCE FROM ACCIDENT.—The simple occurrence of an accident with resulting injury to a passenger raises a presumption of negligence upon the part of the carrier, and casts upon him the burden of proving that the accident occurred without his fault: See extended note to Philadelphia etc. R. R. Co. v. Anderson, 20 Am. St. Rep. 490-492; McCafferty v. Pennsylvania R. R. Co., 193 Pa. St. 339, ante, p. 690.

RAILROADS.—A PASSENGER ON A FREIGHT TRAIN is entitled to the highest degree of care and diligence from the railway company: Ohio Valley Ry. Co. v. Watson, 93 Ky. 654, 40 Am. St. Rep. 211. He is entitled to the same degree of care as passengers on regular trains, except that he acquiesces in the usual incidents and conduct of a freight train as managed by prudent and competent men: McGee v. Missouri Pac. Ry. Co., 92 Mo. 208, 1 Am. St. Rep. 706. See, too, Illinois Cent. R. R. Co. v. Bebee, 174 Ill. 13, 66 Am. St. Rep. 253.

McNAIR v. MOORE.

[55 SOUTH CAROLINA, 435.]

NEGOTIABLE INSTRUMENTS—PLACE OF PAYMENT.—The dating of a note at a particular place is not sufficient to make it payable at that place.

NEGOTIABLE INSTRUMENTS—INTEREST AFTER MATURITY—DEFENSE.—The maker of a note is not liable for the payment of interest on a note after maturity if, at the time of maturity and at the place designated in the note, he was ready and offered to pay the full amount due on the note.

NEGOTIABLE INSTRUMENTS—ACTION ON—DEMAND FOR PAYMENT.—The payee of a promissory note is not required to make demand for payment after maturity before commencing suit thereon.

Stevenson & Matheson, for the appellant.

R. T. Caston, for the appellee.

⁴³⁶ McIVER, C. J. The action in this case was brought to recover the balance due on a note, bearing date the 23d of March, 1896, whereby the defendant promised to pay to the order of Mrs. Jennie M. Pegues, on or before the first day of January next, after said date, the sum of fifteen hundred dollars, with interest after maturity at the rate of eight per cent per annum, until fully paid, and was dated at Bennettsville, South Carolina. The complaint was in the usual form, and alleged that the payee before maturity indorsed the same to plaintiff for value received; and also alleged that no part thereof had been paid, except the sum of fifteen hundred dollars, which was paid upon the twenty-sixth day of March, 1897. Judgment was demanded for the sum of twenty-eight dollars and fifty-eight cents, being the interest on the principal sum named in the note from the first day of January, ⁴³⁷ 1897, to the twenty-sixth day of March, 1897, with interest thereon from the last-named date. The answer admits all the allegations of the complaint, except that there is any balance due, and on the contrary alleges, in the second paragraph, that the note had been paid in full. In the third paragraph of the answer the allegations are as follows: "That when the said note matured, he had the money on hand to pay the same, and was ready and waiting to pay it, and kept the money ready to pay the same on demand, but the same was not presented for payment until March 26, 1897, and he immediately paid the same in full. That the failure to present the same for payment was due to the default of the plaintiff, and for the purpose of getting the high rate of interest stipulated for; and the said failure to present, coupled with the readiness of defendant to pay the same, prevented interest from running, and, when presented, only the principal sum was due, and that has long since been paid, being paid promptly on demand." It is stated in the "case" that, at the hearing before his honor, Judge Watts, "it was admitted by defendant's attorneys that the defense of payment generally was not set up in the answer, as might be inferred from paragraph 2 of answer, but the defense relied upon the plea of payment as made in the third paragraph of the answer." The plaintiff demurred to the answer upon the ground that it did not state facts sufficient to constitute a defense, in the particulars stated in writing, in accordance with

the rule of court, which need not be set out here. The circuit judge sustained the demurrer and rendered judgment for the plaintiff for the balance claimed to be due in the complaint. From this judgment defendant has appealed upon the several grounds set out in the record, which need not be stated here, as the sole question which we are called upon to determine, under the admission of counsel stated in the record as copied above, is whether the facts stated in the third paragraph of the answer set out above are sufficient to constitute a defense. Or, to state the question more precisely, Is the fact that the ⁴³⁸ maker of this note had the money on hand to pay the same when the note matured, "and was ready and waiting to pay it, and kept the money ready to pay the same on demand," and did pay the principal sum as soon as it was demanded—nearly three months after maturity—sufficient to relieve the defendant from the obligation to pay interest from maturity to the date of such payment? It will be observed that in the note which constitutes the basis of this action no place of payment is specified, for the fact that the note was dated at Bennettsville, South Carolina, is not sufficient to make it payable at that place, as held in *Miller v. Thompson*, 1 Rice Dig. 129, and *Galpin v. Hard*, 3 McCord, 400, 15 Am. Dec. 640. But even when the place of payment is specified in the note, it is not necessary to either allege or prove that the note was presented and payment demanded at such place, in order to give a right of action against the maker, though it is otherwise when the action is brought against the indorser; and it seems to us that counsel for appellant in their argument have failed to observe this distinction; for in several of the cases which they cite the action was against the indorser: 4 Am. & Eng. Ency. of Law, 373, 2d ed., 373; *Wallace v. McConnell*, 13 Pet. 136; *Clarke v. Gordon*, 3 Rich. 311, 45 Am. Dec. 768; and *McKenzie v. Durant*, 9 Rich. 61, where O'Neill, J., in delivering the opinion of the court, uses this pertinent language: "The maker of the note has no right to expect a demand of payment to be made. It is his business to meet the payment when by the terms of it he has promised to make it."

But counsel for appellant contends that inasmuch as there was no designation of any place of payment in the note, it became, as a matter of law, payable at defendant's place of residence, and the allegation in the answer that when the note matured "he had the money on hand to pay the same, and was ready and waiting to pay it, and kept the money ready to pay

the same on demand," was sufficient to relieve him from the payment of interest after maturity; and he bases his contention on the case of Wallace v. ⁴³⁹ McConnell, 13 Pet. 136, where it is said: "In actions on promissory notes against the maker and the note is made payable at a specified time and place, it is not necessary to aver in the declaration or prove on the trial that a demand of payment was made in order to maintain the action. But if the maker was at the place at the time designated, and was ready *and offered* [*italics ours*] to pay the money, it was matter of defense to be pleaded and proved on his part," which language is quoted with approval in Langston v. South Carolina R. R. Co., 2 S. C. 253. But the appellant in his allegations omits the very important words "and offered," which we have italicized in the foregoing quotation. His allegations, therefore, do not bring his case within the principle upon which he relies; for there is no allegation that he has offered to pay the note, either to the original payee or to the plaintiff, her indorsee, or that he ever notified either of them that he was ready and willing to pay the same. So that, even conceding (for the purposes of this case only) that the principle upon which appellant relies is applicable to an action on a note in which no place of payment is designated, it still cannot avail him, for the reason that there is no allegation of any offer to pay the note at any time or place; for, as is said in 25 American and English Encyclopedia of Law, first edition, at page 916: "The mere readiness and willingness of a debtor to pay the debt when due amounts to nothing without an offer or tender of payment by him and a refusal by the creditor." The case of Bank of Charleston v. Zorn, 14 S. C. 444, 37 Am. Rep. 733, relied upon by appellant, is very different from this case. There the action was brought by the bank, as indorsee, upon a note made by defendant to Wroton & Dowling, his factors, payable at their office, on the first day of October, 1876. This note was transferred before maturity to the bank by Wroton & Dowling, as collateral security for their own note to the bank, and the defendant, without notice of such transfer, left with Wroton & Dowling sufficient funds to pay the note at maturity. Subsequently, he had a settlement with Wroton & Dowling, in which he was ⁴⁴⁰ charged with the amount of the note and credited with the funds deposited to meet it at maturity. Very soon after Wroton & Dowling failed, and the bank brought its action on the note against Zorn. The circuit judge charged the jury that if they believed the plaintiff was guilty of laches in not

demanding payment of the note at the office of Wroton & Dowling before their failure, and that plaintiff would have received the money if the note had been presented, and by their failure to do so the defendant lost his money, they should find for the defendant. The jury so found and the judgment was affirmed. From this statement it is obvious that the two cases are unlike, and that there is scarcely a resemblance between them. Indeed, there is no allegation in the answer that the defendant has sustained any loss by reason of the failure of the plaintiff to demand payment of the note at maturity, which, as we have seen, he was under no obligations to do.

Looking at the case in the light of reason and common sense, it seems to us that we must reach the same conclusion as that to which we have been conducted by the authorities. The defendant is sued to enforce the obligation into which he entered when he signed the note. What was the obligation? To pay the sum of money mentioned in the note on the first day of January, 1897. His own allegations show that he failed to comply with that obligation, and he thereby incurred the obligation to pay interest on that sum of money at the rate of eight per cent per annum, until the sum was fully paid; and no facts are alleged in the answer sufficient to relieve him from that obligation. As we understand it, when one person promises to pay to another a specified sum of money on a designated day, it becomes his legal duty to seek out his creditor and make the payment as promised, and it is no part of the duty of the creditor to make demand for the money due, as we have seen, before he can bring his action to enforce the performance of the defendant's contract according to its terms. It seems to us, therefore, that in no view of the case was there ⁴⁴¹ any error upon the part of the circuit judge in sustaining the demurrer.

The judgment of this court is that the judgment appealed from be affirmed.

NEGOTIABLE INSTRUMENTS—PAYMENT.—The maker of a note payable at a particular time and place is liable thereon, though it is not presented at the time and place named; but he may avoid the payment of future interest, damages, and costs of suit by a plea therein alleging both a readiness and ability to pay at the time and place designated and ever since, and that he brings the money into court for that purpose: *Greeley v. Whitehead*, 35 Fla. 523, 48 Am. St. Rep. 258.

NEGOTIABLE INSTRUMENTS—PLACE OF PAYMENT.—The place at which a note is to be paid is not necessarily indicated by the place at which it is dated: *Galpin v. Hard*, 3 McCord, 394, 15 Am. Dec. 640, and see the extended note thereto.

NORRIS v. HARTFORD FIRE INSURANCE COMPANY.

[55 SOUTH CAROLINA, 450.]

INSURANCE—PLEADING DEFENSE.—In an action on an insurance policy, containing a provision that the policy shall be void if the insured has knowledge of the commencement of foreclosure proceedings against any property covered by the policy, an answer, which sets up as a defense a breach of this provision, is good on demurrer.

INSURANCE — CONSTRUCTION OF STIPULATION. — Where an insurance policy contains a provision that the policy shall be void "if, with the knowledge of the insured, foreclosure proceedings be commenced," the knowledge of such proceedings need not antedate or coexist with their commencement, but is required only when the papers are served, and the forfeiture takes effect at that time.

King & Spalding and Parker & Greene, for the appellant.

M. P. De Bruhl, for the appellee.

452 POPE, J. To understand this appeal it will only be necessary to state that the defendant insurance company issued its policy whereby, for a valuable consideration at the time paid, it agreed to insure the plaintiff's dwelling-house against loss by fire, valued at sixteen hundred dollars, to the amount of twelve hundred dollars, from May 26, 1896, to May 26, 1897, and by an indorsement on the policy it was made payable in case of loss to Agnes L. Lawing as her interest might appear. The house was burned on the twenty-second day of September, 1896. Notice of fire and proofs of loss were served on defendant. Payment not being made, the present action was commenced July, 1897. The defendant claimed that the policy was rendered null and void because Mrs. Agnes L. Lawing began her action for the foreclosure of the mortgage she held on the house and lot of plaintiff, which had been insured by defendant company on the 13th of August, 1896, and service of copies of pleadings was made on said plaintiff on the fourteenth day of August, 1896. The clause of the policy in question was in these words: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if, . . . with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of any sale of any property covered by this policy, by virtue of any mortgage or trust deed." When this forfeiture was set up in the defendant company's answer as a defense to plaintiff's
453 action, plaintiff interposed a demurrer because the answer

did not state facts sufficient for a defense. After argument, his honor, Judge Klugh, granted an order sustaining plaintiff's said demurrer, and although defendant gave notice of an appeal from the order, the circuit judge ordered the trial to proceed, which resulted in a verdict from the jury for the full amount claimed by the plaintiff to be due. Defendant company now asks this court to reverse the judgment of the circuit decree, and to declare it error in the circuit judge when he sustained plaintiff's demurrer to defendant company's answer.

It seems to us that the circuit judge was in error in sustaining the demurrer in the case at bar. The language of the contract of insurance is explicit, that if the insured has knowledge of the commencement of foreclosure proceedings the policy shall be rendered void. We think the allegations of the answer are explicit in setting up this defense. Here is the allegation as quoted from the answer in question: "For a further defense said defendant sets up the condition and stipulation of said policy, to wit: 'This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if with the knowledge of the insured foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy, by virtue of any mortgage or trust deed'"; and alleged that on August 13, A. D. 1896, Mrs. Lawing, the mortgagee, instituted proceedings to foreclose said mortgage against Mrs. Norris in said court of common pleas of Abbeville county; that notice of said proceedings was served upon and received by the plaintiff on August 14, A. D. 1896, after the writing of the policy sued on and prior to the date of the fire, and that at the date of said fire there were in existence the aforesaid proceedings to foreclose said mortgage, of which the insured had knowledge; that said proceedings constituted a breach of said covenant and condition of said policy of insurance above quoted, and rendered the same void; and that said policy was void and ⁴⁵⁴ of no effect on September 23, 1896, "and had been so continuously since August 14, 1896, and still was void." As before remarked, these allegations are explicit. The stipulation in question is a part of plaintiff's contract with the defendant insurance company. The latter now pleads this stipulation, as it had a right to do. We wish to be clearly understood: We are passing upon the demurrer—we are not passing upon any defense, or defenses, if such exists, which the plaintiff may interpose to this stipulation in the contract of the parties.

It is urged that the language in which the stipulation is couched requires us to so construe the same as that the knowledge of the insured of these foreclosure proceedings must ante-date or coexist with the commencement of such proceedings, which was on the 13th of August, 1896, when in point of fact the plaintiff only knew of such proceedings on the next day—the fourteenth day of August, 1896. We cannot accept any such view. It is obvious that the stipulation in question was intended by the insurance company to cover an instance when temptation should be most grievous to the insured; for, she being unable to discharge the mortgage, would see the day of settlement with her mortgagee fast approaching, and, therefore, temptation to destroy by fire would prove more attractive than ever before. Hence, the insurance company expressly, in plain, unambiguous words, stipulated that such proceedings when known to the mortgagor should render the policy of insurance void, unless otherwise provided by an agreement. We have never had this clause of a policy of insurance before us at any time before this, but we will now give it our attention. Stress is laid on the fact that section 120 of our Code of Procedure states that an action is commenced when the summons is delivered into the hands of the sheriff with the intention that he shall serve the same. The full text of section 120 is: “An action is commenced as to each defendant when the summons is served on him, or on a codefendant who is a joint contractor or otherwise united in interest with ⁴⁵⁵ him. An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this title, when the summons is delivered, with the intent that it shall be actually served, to the sheriff, etc.” It may be well to notice that by the terms of this section an action is actually commenced when it is served upon the defendant. Then, an attempt to commence an action is deemed equivalent to the commencement thereof when delivered to the sheriff, etc. Not that this delivery to the sheriff is actually a commencement of the action, but the equivalent to such commencement. This view is fortified by section 148, which provides: “Civil actions in the courts of record of this state shall be commenced by service of a summons.” When, therefore, parties to a contract made in this state used the words “commencement of an action,” so far as knowledge of notice of such action is concerned, we should hold that such commencement was by service upon the defendant. We so hold in this instance. Inasmuch as we have held that the circuit

judge was in error in sustaining the demurrer to the answer of defendant insurance company, of course he was in error in refusing to allow the introduction of the record of the foreclosure proceedings between Agnes L. Lawing, as plaintiff, against Julia E. Norris, defendant.

But plaintiff suggests additional grounds to sustain the circuit judge other than that embraced in his order. Rule 18 of circuit court rules shuts off the consideration of any other ground of demurrer except that brought to the attention of the circuit judge; hence the additional grounds of respondent to sustain circuit judgment are unavailing. These grounds were not made at trial, nor can we ascribe any potency to the position that defendant is estopped from raising its defense because no part of premium was restored. It is time enough to do this when policy is returned for cancellation; such is the language of the policy itself. It follows, therefore, ⁴⁵⁶ that all the proceedings in the court below as to the trial of this cause must be reversed.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the action be remanded to the circuit court, with directions to annul the order sustaining the demurrer to defendant's answer, and for such other proceedings as may be necessary.

INSURANCE—CONDITION AGAINST FORECLOSURE.—Under a policy of insurance conditioned to be void "if, within the knowledge of the assured, foreclosure proceedings be commenced," it is not necessary that a sale should be effected, but it is sufficient that notice of the sale has been given or foreclosure proceedings otherwise commenced: Note to *Horton v. Home Ins. Co.*, 65 Am. St. Rep. 724. Such a condition, however, is operative against the mortgagor only, and does not avoid the policy as against the mortgagee on the commencement by him of a suit to foreclose his mortgage: *Lancashire Ins. Co. v. Boardman*, 58 Kan. 339, 62 Am. St. Rep. 621. See, too, *Horton v. Home Ins. Co.*, 122 N. C. 498, 65 Am. St. Rep. 717.

McBRYDE v. SOUTH CAROLINA MUTUAL INSURANCE COMPANY.

[55 SOUTH CAROLINA, 589.]

INSURANCE—MUTUAL—WAIVER.—The doctrine of waiver as applied to ordinary insurance companies is applicable to mutual insurance companies.

INSURANCE—PROOF OF LOSS—OBJECTION TO.—Where the proof of loss is not made in strict conformity with the form prescribed by the policy, the insurance company waives the right to object to the form of such proof by failing to object to the proofs and not requiring other proper evidence, and by contesting the case upon its merits.

INSURANCE—FORFEITURE FOR ADDITIONAL INSURANCE—NOTICE TO COMPANY.—Where an insurance policy is, by its terms, declared to be void, if, at the time of its issuance, there was other insurance on the property, the fact that other insurance existed on the property will not cause a forfeiture of the policy, when the insurance company had imputed notice, through its agent, of the existence of such insurance.

William N. Graydon, for the appellant.

McCullough & Martin, for the appellee.

390 GARY, J. The defendant is a corporation chartered under the laws of this state for the purpose of conducting the business of fire and life insurance on the assessment plan. On the 20th of November, 1897, the defendant issued a policy of insurance to the plaintiff on her dwelling-house, in the county of Abbeville, for two hundred dollars, and on the 22d of December, 1897, it insured the said property in the additional sum of two hundred dollars. The dwelling-house was totally destroyed by fire on the 31st of December, 1897, and this action was brought to recover the said insurance. His honor, the presiding judge, granted an order of nonsuit on grounds which will be hereinafter mentioned.

The respondent's attorney virtually concedes in his argument that if the rule laid down in the cases of *Sample v. London etc. Ins. Co.*, 42 S. C. 14, *Copeland v. Western Assur. Co.*, 43 S. C. 26, *Schroeder v. Springfield Ins. Co.*, 51 S. C. 180, and other recent cases as to waiver, were applicable to this case, the circuit judge erred in granting the nonsuit. In 16 *American and English Encyclopedia of Law*, 17, 18, it is said: "The only distinction between contracts of mutual insurance and other insurance contracts consists in the fact that the liquidation of those of the former class is made from a fund obtained by periodical tax upon the members at stated

intervals, or as required, while in other cases the amount stipulated to be paid to the beneficiary is absolute, and dependent only upon the success of the business, and the ability of the insurer to pay the stipulated indemnity." In the same volume, at page 26, the following language from Bacon on Benefit Societies and Life ⁵⁹¹ Insurance, section 78, is quoted with approval: "So far as corporations carrying on a life insurance business, either on the plan of annual, semi-annual, or quarterly premiums, and the accumulation of a reserve fund, or upon the new assessment plan, where calls are made as necessity requires, monthly or less or more frequently, are concerned, it may be said that it is hard to conceive of any reason why such organizations should be governed by any rules different from those governing other corporations." Corporations carrying on the business of insurance on the assessment plan, or on the other plan just mentioned, have the same object in view—there is the same necessity for intrusting the conduct of the business to a certain number of persons, and there is no reason why a more favorable rule should prevail in behalf of those conducting business on the assessment plan than those carrying on the business on a different plan. It is contended that a different rule was announced in the case of *Joye v. South Carolina Mut. Ins. Co.*, 54 S. C. 371. In that case the plaintiff failed to pay the assessments ordered on the — day of December, 1896, and on the 27th of January, 1897; she was notified on the 27th of February, 1897, that her policy was suspended for failure to pay the said assessments; the property was destroyed by fire on the 13th of March, 1897, and she did not forward the money to pay the assessments until after the fire. The nineteenth by-law was as follows: "All assessments must be paid within thirty days after written notice is mailed. If not paid, the policy shall be suspended, and be liable to assessment until the policy is properly canceled. Suspended policies may be reinstated without extra cost by the assured paying back assessments, provided the property be in the same condition as when suspended." In that case the active energy of the policy had ceased to exist by the operation of law, in pursuance of the express language of the contract, and the destruction of the property by fire made it impossible for the plaintiff to be reinstated to membership, in so far as that property was concerned. All the testimony as to waiver related to facts occurring after ⁵⁹² the property had been destroyed. Under these circumstances, there was no foundation upon which waiver could be predicated. This prin-

ciple is recognized in the case of *Carlson v. Supreme Council*, 115 Cal. 466, 35 L. R. Ann. 643, the syllabus of which is as follows: "1. The right to reinstatement within a certain period, upon payment of accrued assessments after the forfeiture of membership in a mutual benefit society, which takes place eo instanti by operation of law, and without notice under the terms of the contract, upon nonpayment of assessments, is terminated by the death of the member without such payment during the time allowed for reinstatement; and a tender of the assessments made within that period by the beneficiary is unavailing; 2. A benefit society does not waive a forfeiture for nonpayment of assessments, by making further assessments and giving notice thereof within the period during which the insured has a right to reinstatement upon making payment of all accrued assessments." The case of *Joye v. South Carolina Mut. Ins. Co.*, 54 S. C. 371, is not inconsistent with the case hereinbefore mentioned, and its doctrine is affirmed.

The first ground upon which the nonsuit was granted is as follows: "The plaintiff's evidence shows that the proofs of loss were not accompanied with certificate of the nearest magistrate or notary public as to correctness of same, as provided for by by-law No. 17." The plaintiff furnished proofs of loss, to which the defendant made no objection. By-law No. 17 is as follows: "In case of loss, the policy-holder shall make proof of same upon blanks adopted and furnished by the company, with certificate of the nearest magistrate or notary public as to the correctness of same." It is to be construed in connection with the following provisions of the policy: "6. All persons insured by this company, sustaining any loss or damage by fire, wind, or lightning, shall immediately give notice to the company that such loss or damage has occurred, and shall deliver in as particular an account of their loss or damage as the nature of the case will admit, and make proof of the same ⁵⁹³ by their declaration and such other proper evidence as the directors of this company may reasonably require, and, if there appear fraud or false declaring in support of such claim, before or after loss, then the claimant shall forfeit all benefit under the policy. Payment of any loss or damage shall be due within sixty days after satisfactory proof thereof shall have been made to the company." As the directors of the company did not object to the proofs of loss, the plaintiff had the right to assume that they were satisfactory to the directors, and she was not compelled to furnish "other proper evidence," in the absence of a request to

that effect. Furthermore, the defendant, by contesting the case upon the merits, waived the right to object to the proofs of loss.

The second ground upon which the nonsuit was granted is as follows: "That said policy sued on was void, because at the time said policy was alleged to have been issued there was other insurance on the property alleged to have been insured, in violation of said contract." In the case of *Copeland v. Western Assur. Co.*, 43 S. C. 26, hereinbefore mentioned, the court says: "The following rules are deduced from the authorities: 1. That where defendant claims that the plaintiff has no right of recovery on the policy of insurance, by reason of the fact that he failed to comply with the requirements of the policy, such objection must be set up in his answer to the complaint; 2. That where the defendant sets up a defense in his answer that the plaintiff is barred of his right of recovery on the policy of insurance by reason of his failure to perform certain things therein required to be done on his part, it is not incumbent on the plaintiff to introduce testimony showing such performances by him, and, consequently, a failure to introduce such testimony does not entitle a defendant to an order of nonsuit; 3. That where the defendant sets up such defense in his answer, and the facts brought out during the introduction of plaintiff's testimony in chief show that there has not been performance by the plaintiff of such requirements of the policy, still the defendant ⁵⁹⁴ would not be entitled to an order of nonsuit, because such order would deprive the plaintiff of his right to show waiver or estoppel on the part of the defendant to make such objection." These principles have been affirmed in several subsequent cases. Furthermore, the soliciting agent of the defendant was informed when the application was made for the insurance that there was other insurance on the property, and this was notice to the principal: *American etc. Co. v. Felder*, 44 S. C. 478. As the defendant had imputed notice through its agent that there was other insurance on the property, it would work a great hardship on the plaintiff, to use no stronger expression, for the defendant to claim a forfeiture on this count: *Gandy v. Orient Ins. Co.*, 52 S. C. 224.

The circuit judge was in error in granting the nonsuit, and the case must be remanded for a new trial.

Pope, J., concurred generally, with the reservation that he was not prepared to accept the view that practically no differ-

ence exists between old line insurance companies and mutual insurance companies.

INSURANCE.—KNOWLEDGE OF PRIOR INSURANCE will not be imputed to an insurer because his agent was put upon inquiry, or might, by the exercise of diligence, have ascertained the truth: *Sanders v. Cooper*, 115 N. Y. 279, 12 Am. St. Rep. 801. But see *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 182, 50 Am. St. Rep. 400; *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524, 34 Am. St. Rep. 877.

INSURANCE.—PROOF OF LOSS.—If the insurer denies his liability for a loss, he thereby waives any defects in the proofs of loss as submitted to him: *Angier v. Western Assur. Co.*, 10 S. Dak. 82, 66 Am. St. Rep. 685; *German-American Ins. Co. v. Norris*, 100 Ky. 29, 66 Am. St. Rep. 324. And the silence of the agents and managers of an insurance corporation after receiving proofs of loss is a waiver of any further proofs: *Morotock Ins. Co. v. Cheek*, 93 Va. 8, 57 Am. St. Rep. 782; *Moyer v. Sun Ins. Office*, 176 Pa. St. 579, 53 Am. St. Rep. 690.

CASES
IN THE
SUPREME COURT
OF
SOUTH DAKOTA.

**MEUER v. CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY.**

[11 SOUTH DAKOTA, 94.]

EVIDENCE—PRESUMPTION—STATUTE LAW OF ANOTHER STATE.—A court will not presume that the statute law of another state is the same as the statute law of this state.

EVIDENCE—PRESUMPTION THAT A DECISION OF ANOTHER STATE COURT CONTAINS THE LAW.—A decision of the highest court of another state, as to the law of that state upon a question involved in a contract made therein, will be presumed to contain the law in force in that state at the time the contract was executed, where the decision was rendered only one year prior to the execution of the contract.

EVIDENCE—LAWS OF ANOTHER STATE—OBITER DICTA.—Although much of the opinion of the highest court of another state is obiter dicta, the case is still some evidence of the law of that state, and warrants a jury in finding the law of that state to be as stated in the opinion.

EVIDENCE—PRESUMPTION AS TO EXISTENCE OF STATUTE IN ANOTHER STATE.—In a controversy here over a contract made in another state, it will not be presumed that such other state has any statute, upon the subject, though there is one here.

CONFLICT OF LAWS—CONSTRUCTION OF CONTRACTS. The law of the state in which a contract for the transportation of passengers, as well as livestock and merchandise, was made, is controlling, unless it appears that it was the intention of the parties to be bound by the law of some other state, although one of the parties was, at the time of its execution, a resident of another state than the one in which it was made.

Action by Meuer against the defendant railway company to recover damages for personal injuries received while shipping stock over the defendant's road. There was a judgment for the plaintiff and the defendant appealed.

John H. Perry, H. H. Field, and A. B. Kittredge, for the appellant.

Julien Bennett, for the respondent.

⁹⁷ CORSON, P. J. This case was before us at a former term of this court, and the decision on that appeal is reported in *Meuer v. Chicago etc. Ry. Co.*, 5 ⁹⁸ S. Dak. 568, 49 Am. St. Rep. 898, and in which the facts are fully stated. On that appeal this court held that the contract under which the plaintiff was transported from Wisconsin to this state, having been executed in Wisconsin, was a contract made in that state, but there being no evidence in the record as to what the law of Wisconsin was as to the right of a common carrier to limit his liability for the negligent acts of himself and servants, the court would presume, in the absence of any evidence upon the subject, that the law of Wisconsin was the same as the law of this state, and hence decided the case then before us in accordance with the laws of this state. On the second trial, the plaintiff introduced evidence tending to prove what the law of Wisconsin was upon the subject as to the right of a common carrier to limit by contract his liability for the negligence of himself and servants. The only evidence offered was two decisions of the supreme court of the state of Wisconsin, namely, *Annas v. Milwaukee etc. R. R. Co.*, 67 Wis. 46, 58 Am. Rep. 848, decided in 1886, and *Abrams v. Milwaukee etc. Ry. Co.*, 87 Wis. 485, 41 Am. St. Rep. 55, decided in 1894. The contract in controversy in this case was executed in 1887. The appellant contends that this evidence was insufficient as proof of the law of Wisconsin upon this subject: 1. Because it was insufficient to overcome the presumption that the law of Wisconsin is the same as the law of this state; 2. Because there was no evidence as to what the law of Wisconsin was at the time plaintiff's contract was made.

The learned counsel for the appellant assume that this court on the former appeal decided that it would presume that the statute law of Wisconsin was the same as the statute law of this state. In this the counsel are in error. This court simply held that it would presume that the law of Wisconsin ⁹⁹ was the same as the law of this state, not that it had a statute similar to that of this state. Upon this question this court cited with approval *Palmer v. Atchison etc. R. R. Co.*, 101 Cal. 187, in which that court says: "This cause, so far as can be determined from the record, was tried upon the theory that the law

of California is applicable. There is no suggestion that the law of Missouri, where the contract for transportation was made, was put in evidence. Under such circumstances, we are not at liberty to assume as a fact that the state of Missouri has a special statute on the subject, but must presume, as a question of law, that the law of that state is the same as our own." We are inclined to the opinion that it would be more technically accurate to say that the appellate court will not presume that the law of another state is different from the law of the state in which the contract is sought to be enforced. The party asserting or claiming that it is different assumes the burden of proving that such is the fact. But in no event will the court presume that the statute law of another state is the same as the statute law of this state. The contention of appellant that the plaintiff was required to show that Wisconsin had a different statute upon the subject is therefore not tenable.

We cannot agree with counsel for appellant in their contention that the decisions given in evidence, found in the Wisconsin reports, were insufficient to prove that by the law of Wisconsin common carriers cannot limit their liability for the negligence of themselves and agents. We are of the opinion that the jury were fully warranted in finding the law of that state to be different from the law of this state, in the absence of conflicting evidence. The court, in the case of *Annas v. Milwaukee etc. R. R. Co.*, 67 Wis. 46, 58 Am. Rep. 848, through Mr. Justice Taylor, reviewed at great ¹⁰⁰ length the powers of common carriers in that state to limit their common-law liability, and fully adopted the rule laid down by the supreme court of the United States in *Railroad Co. v. Lockwood*, 17 Wall. 357, except where the carriage is gratuitous. As this decision was made only one year prior to the execution of the contract in controversy in this action, the court will presume, in the absence of any other decision or statute to the contrary, that the law as laid down in that decision continued in force in that state at the time the contract in controversy was executed. In *Ely v. James*, 123 Mass. 36, decided in 1877, the supreme court of Massachusetts held the following instruction to the jury as correctly stating the law: "That the unwritten or common law of New York may be proved by parol evidence, or by the books of reports of cases adjudged in the courts of that state, and the plaintiffs' counsel has read in evidence a case from 7 Johnson, a New York report [*Schemerhorn v. Loines*, 7 Johns. 311], tending to show that by the law of that state

the taking of a promissory note for goods sold is not an extinguishment of the original debt, or prima facie evidence of it; and although this case was decided in 1810, it is the duty of the court to say to the jury that, in the absence of any conflicting evidence, that it is to be taken to be the law of New York at the present time."

Counsel for appellant further contend that much of the opinion in *Annas v. Milwaukee etc. R. R. Co.*, 67 Wis. 46, 58 Am. Rep. 848, is obiter dicta. But, conceding such to be the fact, the case would still be some evidence of the law of Wisconsin, and, in the absence of conflicting evidence, would warrant the jury in finding the law of that state to be as stated in the opinion. In *Hackett v. Potter*, 135 Mass. 349, the supreme court, in speaking of a decision in New ¹⁰¹ Hampshire, says: "It is argued that these statements are obiter dicta; but, without determining this, it is enough to say that the dicta of the supreme judicial court of New Hampshire, found in the reports of cases, are some evidence of what the law of that state is." We do not deem it necessary to discuss the later decision of the Wisconsin court.

Upon the question as to the effect of the Wisconsin decisions, the court below instructed the jury as follows: "Now, first, upon this question of the effect of the stipulation in the contract, it is a question of fact in this case as to what the law of Wisconsin is. The plaintiff offers evidence upon this question, and no evidence is offered by the defendant upon it; and the court having determined the fact that this proof offered by the plaintiff upon this point is admissible, and no counter-proof being offered, you will necessarily find upon this point that this stipulation in this contract is ineffectual and inoperative under the laws of Wisconsin, by the laws of which state the rights of the parties in this action are to be determined. Consequently, you will not be required to spend any time in deliberating upon this proposition." No exception appears to have been taken to this part of the charge, but counsel for defendant requested the court to charge the jury as follows: "The jury are instructed that there is a presumption that at the time of making the contract in question there was a statute in force in the state of Wisconsin, like the statute in force in the territory of Dakota at that time, which authorized the defendant to limit its liability for injuries to the plaintiff received while unloading the stock in question, unless such injuries were caused by the gross negligence, fraud, or willful wrong of the defendant or its

employés; that the burden of proof of overcoming such presumption ¹⁰² is on the plaintiff; and you are instructed that the evidence is insufficient to overcome such presumption, or to show that said contract was void under the law of Wisconsin." We are of the opinion that the court properly refused the latter instruction. There was no presumption that there was any statute in force in the state of Wisconsin like the statute in force in this state. While the court trying the case in this state, in the absence of proof that the law of Wisconsin was different from that of this state, would not presume it was different, or, as generally stated, would presume the law of Wisconsin was the same, yet it will not presume that the state of Wisconsin has any statute upon the subject.

This court on the former appeal held that the "contract in this case, having been made in Wisconsin, may be regarded as a contract of that state, and to be interpreted in accordance with the laws of that state." Appellant insists, on this appeal, that this should now be modified, in view of the facts proven in this case that were not shown on the former trial, namely, that the plaintiff was a resident of the then territory of Dakota when this contract was executed, and that it was therefore executed in view of the Dakota law. The rule that any point decided on an appeal becomes the law of the case in all its stages (*St. Croix Lumber Co. v. Mitchell*, 4 S. Dak. 487; *Plymouth Co. Bank v. Gilman*, 3 S. Dak. 170, 44 Am. St. Rep. 782) is not questioned; but the appellant contends that the new facts proven on the second trial make a different case, and hence the rule does not apply to this appeal. But we are unable to agree with appellant in this contention. No case has been cited holding that the fact that the respondent was a resident of this territory when the contract was executed affects the character of the ¹⁰³ contract as a Wisconsin contract. In *Grand v. Livingston*, 4 N. Y. App. Div. 589, 38 N. Y. Supp. 490, decided in 1896 by the appellate division of the supreme court of New York, both plaintiffs and defendant were residents of New York, but the contract was made in Massachusetts; and it was held that the contract must be interpreted by the law of the latter state. In the opinion that court (all the five judges concurring) says: "The value which attaches to the exemption clause of this contract depends, necessarily and in any event, upon whether it is to be governed by the law of Massachusetts or by the law of this state; and the determination of this question involves not only a careful examination of

the instrument itself, but likewise of all the circumstances attending its execution. First in importance, therefore, is the fact that the contract was executed in the former state; and this, of itself, furnishes sufficient reason for concluding that the law of that state is controlling, unless it is made to appear that it was the intention of the parties when entering into the contract, to be bound by the law of some other state. This statement of the law of the place is one which might, perhaps, be safely permitted to rest upon principle, but it is supported by abundant authority. In the case of *Lloyd v. Guibert*, 6 Best & S. 100, it was said by Mr. Justice Willes, in delivering the judgment, that 'it is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought, therefore, to prevail, in the absence of circumstances indicating a different intention, as, for instance that the contract is to be entirely performed elsewhere, or that the subject matter is immovable property situated in another country.' . . . And ¹⁰⁴ this general rule has been recognized and adopted in this country by an almost unbroken line of decisions of both the state and federal courts, to some of which it may be desirable to advert briefly." It was contended in that case that the fact that New York was the legal residence of the defendant and the actual residence of the plaintiffs should be held by the court as indicating an intention to bring the contract within the operation of the law of New York. But that court declined to so hold, and the release from liability, though valid in New York, but invalid under the law of Massachusetts, was held invalid under the law of the latter state. This case was very analogous to the case at bar. The contract made in Boston was to transport a carload of horses from that city to Buffalo, New York, and was made by an agent of the plaintiffs at Boston. That court, in its opinion, reviewed at length the authorities, and arrived at the conclusion that the contract was a Massachusetts contract, fully sustaining the views of this court in its former opinion as to the contract in the case at bar being a contract made in, and to be interpreted by, the law of Wisconsin. In addition to the authorities cited in our former decision see *McDaniel v. Chicago etc. R. R. Co.*, 24 Iowa, 412; *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Dyke v. Erie Ry. Co.*, 45 N. Y. 113, 6 Am. Rep. 43; *China Mut. Ins. Co. v. Force*, 142 N. Y. 90, 40 Am. St. Rep. 576; *Cox v. United States*, 6 Pet. 172.

In our opinion, the new facts proven on the second trial did not have the effect to take the case out of the rule that a point decided on the former appeal becomes the law of the case in all its stages. But, if we did not apply that rule to this case, we are, upon a review of the question, clearly of the opinion that the decision of the court was correct, and that the doctrine ¹⁰⁵ may be regarded as practically settled that a contract for the transportation of passengers, as well as livestock and merchandise, unless it is made to appear that it was the intention of the parties, when entering into the contract, to be bound by the law of some other state, must be construed in accordance with the laws of the state where made. These conclusions lead to an affirmance of the judgment, and the judgment of the circuit court is affirmed.

EVIDENCE—PRESUMPTION—STATUTE OF ANOTHER STATE.—There is no presumption that the statutes of another state are like those prevailing in this state: *Kelley v. Kelley*, 161 Mass. 111, 42 Am. St. Rep. 389. Contra, in the absence of proof the statutory law of another state is presumed to be as in this: *Chapman v. Brewer*, 43 Neb. 890, 47 Am. St. Rep. 779.

CONFLICT OF LAWS—CONSTRUCTION OF CONTRACTS.—The law of the place where a contract is to be performed governs: Note to *Bell v. Farwell*, 68 Am. St. Rep. 202. Thus, a contract made in one state, between a railroad company and a shipper for the transportation of freight from a point in that state to a point in another state, and limiting the liability of the carrier, must be interpreted according to the law of the state where it was made: *Meuer v. Chicago etc. Ry. Co.*, 5 S. Dak. 563, 49 Am. St. Rep. 898.

STATE v. DAVIS.

[11 SOUTH DAKOTA, 111.]

COUNTIES—COMPROMISE OF DISPUTED CLAIM.—A BOARD OF COUNTY COMMISSIONERS has power to compromise a disputed claim that has been reduced to judgment. It may, therefore, pending an appeal, compromise a judgment obtained upon a forfeited undertaking in a criminal case, by the acceptance of less than the amount of the judgment.

Action by the state against Davis and another, upon a forfeited undertaking in a criminal case. The state appealed from an order overruling a motion to set aside a satisfaction of the judgment obtained upon the undertaking.

A. Sherin, state's attorney for Marshall county, for the appellant.

Byron Abbott, for the respondent.

113 FULLER, J. This appeal is from an order of the circuit court overruling a motion made by the state's attorney of Marshall county to set aside the satisfaction of a judgment of three hundred dollars, obtained upon a forfeited undertaking in a criminal proceeding, and which the board of county commissioners compromised upon the payment of one hundred dollars. On a question of practice, an appeal by the judgment debtor had been dismissed from this court, and steps were being taken to perfect a second appeal when the settlement was effected, which, it is claimed, was for the best interests of the county, and after reputable counsel had advised the commissioners that the appeal would probably result in reversal of the judgment compromised. The question therefore is: Has a board of county commissioners, in a case like this, power to compromise a disputed claim that has been reduced to judgment, by the acceptance of less than the amount for which the same was rendered? As a general proposition, a judgment is not a conceded finality until the time for taking an appeal has expired; and an agreement between the real parties in interest to give and take, in the way of settlement and to avoid further litigation, something less than the amount of such judgment, is valid and enforceable: *Neal v. Handley*, 116 Ill. 418, 56 Am. Rep. 784; *Hendrick v. Thomas*, 106 Pa. St. 327; *Case v. Hawkins*, 53 Miss. 702; *Clay v. Hoysradt*, 8 Kan. 74; 2 *Freeman on Judgments*, 463. As in this state (Comp. Laws, sec. 5343) "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed," the power of the board, without fraud or collusion, to compromise a suit of this character is the sole subject of inquiry. Although such actions are properly prosecuted by the state's attorney in the **114** name of the state, the entire expense is paid by the county, as the real party in interest, and the forfeiture imposed as a penalty for the failure of the accused to appear according to the terms of his recognizance must be paid as soon as collected into the treasury of the county, to be added to the county general fund, the state recovering no part thereof: Comp. Laws, secs. 2224, 6984, 7611; *State v. Newson*, 8 S. Dak. 327. Moreover, were the statute silent, "money in the county treasury is presumptively the money of the county, . . . and will be held to belong to the county until the contrary is shown":

Sacramento Co. v. Bird, 31 Cal. 67. Each organized county "may sue and be sued, plead and be impleaded, in any court of this state"; and it is expressly made the duty of the county commissioners to institute civil actions "for and on behalf of the county," to assess and collect a sufficient amount of revenue to pay off and discharge judgments obtained against the county," and "they shall superintend the fiscal concerns of the county, and secure their management in the best manner": Comp. Laws, secs. 572, 573, 591, 593. While county commissioners can only exercise powers expressly conferred by statute, and such as are necessary to the proper performance of their imposed duties and trusts, they are the general agents of the county, clothed with express power to sue and be sued; and the exercise of such power carries with it, by necessary implication, authority to compromise in an honest manner a claim in favor of or against the county. The county was the real party in interest, and, through the only agency in existence, had the right, for the public good, to compromise and avoid the hazard and expense of further litigation: *Collins v. Welch*, 58 Iowa, 72, 43 Am. Rep. 111; *Agnew v. Brall*, 124 Ill. 312; ¹¹⁵ *People v. Board of Supervisors*, 27 Cal. 655; *Petersburg v. Mappin*, 14 Ill. 193, 56 Am. Rep. 501; *Supervisors v. Birdsall*, 4 Wend. 454; *St. Louis etc. Ry. Co. v. Anthony*, 73 Mo. 431. As said by the court in *Board of Supervisors v. Bowen*, 4 Lans. 31: "It would be a most extraordinary doctrine to hold that, because a county had become involved in a litigation, it must necessarily go through with it to the bitter end, and has no power to extricate itself by withdrawal or by agreement with its adversary." The board having power to do whatever the county, if capable of rational action, might do as an entity, and being charged with the control and management of its fiscal concerns, it is very evident, in the absence of an express grant of authority from the legislature, that the state's attorney is not, as maintained in his brief, the officer clothed with exclusive jurisdiction in all matters pertaining to the compromise of a suit upon a forfeited undertaking. Of course, where the debtor is solvent, the board cannot without fraud thus discharge an obligation concerning the validity of which there is no question; but where, as in this case, the claim is in doubtful litigation, and a compromise made by the board is fully sustained by the court before whom all proceedings were had, we would most reluctantly disturb such action on appeal. As the

record presents nothing to justify a reversal, the order appealed from is affirmed.

COMPROMISE OF DOUBTFUL CLAIM—CONCLUSIVENESS OF.—A compromise of a doubtful right procured without such deceit as would vitiate any other contract concludes the parties, though ignorant of the extent of their rights: Note to *Bailey v. Philadelphia*, 46 Am. St. Rep. 696.

DELL RAPIDS MERCANTILE COMPANY v. DELL RAPIDS.

[11 SOUTH DAKOTA, 116.]

MUNICIPAL CORPORATIONS—STREETS—OWNERSHIP OF SOIL.—The owner of a lot in a city is presumed to own the soil to the center of the street.

MUNICIPAL CORPORATIONS—AREA IN STREET.—AN ABUTTING LOTOWNER, assuming that he owns the soil to the center of the street, does not commit an unlawful act by constructing an area in the street in front of his property, and he has a right to use it, subject to the public easement.

MUNICIPAL CORPORATIONS—INJURY FROM BAD CONDITION OF DRAINS AND SEWERS—AREA IN STREET.—If an abutting lotowner in a city constructs an area in front of his property in the street, and such property, including the area, is occupied by a tenant, but the city so negligently constructs its sewers and drains that they will not carry off the rainfall, thus causing water to be collected in the area and discharged therefrom in great quantities, to the injury of the tenant's goods in the basement of the building, he may recover damages of the city for such injury, provided the area was properly constructed and in proper repair when the injury occurred; and the tenant cannot be held to have contributed to the injury by having merely occupied the area.

INSTRUCTIONS—DEFINITENESS.—A PARTY CANNOT, ON APPEAL, COMPLAIN that the instructions given were not sufficiently definite, where he failed to request any instructions and did not preserve any exceptions to those given.

Action by the plaintiff company against the defendant city to recover damages for injuries alleged to have been occasioned by a sewer negligently constructed and kept in bad condition and repair by the defendant. The plaintiff obtained a judgment, from which the defendant appealed.

Henry Robertson, Robertson & Dougherty, and Aikens & Judge, for the appellant.

A. B. Kittredge, for the respondent.

117 HANEY, J. Plaintiff occupied the first story and basement of a building situated at the corner of two streets in the

city of Dell Rapids. The building was owned by one Cooley, who was the owner in fee simple of the lots upon which it stands. When it was erected an area was constructed in the street, ¹¹⁸ secured by stone walls. This area was reached by a stairway from the street. There were doors and other openings between it and the basement. Some years subsequent to the erection of the building and area defendant constructed certain drains and a sewer, which plaintiff alleges were so defective in construction, and were kept in such bad condition and repair, that the rainfall could not escape and be conveyed away, but collected in great quantities in and upon the streets, and by reason thereof an immense and unusual body of water was discharged into the basement occupied by plaintiff, causing injury to its goods kept therein. It is agreed that the damage was five hundred and fourteen dollars and twelve cents. The answer in effect denies that the city was negligent, and alleges that the area walls were out of repair, and that the plaintiff, who occupied the building as a tenant and was paying a rental of fifty dollars per month, contributed to the injury by knowingly permitting such walls to remain in such defective condition. Under instructions to which no exceptions were taken, the jury must have found that the walls of the area would have kept the water out of the basement if the drains and sewer had been in proper condition, and that the drains and sewer were not in proper condition through defendant's negligence.

It is contended by defendant that upon the undisputed evidence, notwithstanding the verdict, the plaintiff cannot recover, for the reason that no injury could have resulted from defendant's negligence if there had been no area in the street; that one who makes or occupies such an area does so at his peril; and that the city is not required to recognize its existence in making or maintaining any street improvements. Manifestly, the rights and duties of one who owns the soil to the ¹¹⁹ center of the street are essentially different from the rights and duties of one whose fee simple title is limited by the lines of his lot. In this state the owner of a lot will, in the absence of any evidence on the subject, be presumed to own the soil to the center of the street: *Edmison v. Lowry*, 3 S. Dak. 77, 44 Am. St. Rep. 774. Assuming that Cooley owned the soil to the center of the street, he was at liberty to use it, subject to the public easement, the same as other parts of his property, and

the construction of the area was not in itself unlawful: *McCarthy v. Syracuse*, 46 N. Y. 194. The rule might be otherwise were the fee of the street in the city: *Guthrie v. Nix*, 5 Okla. 555.

It follows that plaintiff cannot be held to have contributed to the injury by having merely occupied the area, and it is entitled to recover if the city was negligent, provided the area was properly constructed and in proper repair when the injury occurred. As to what constitutes a proper construction and condition of such an area will depend upon the facts of each particular case. Undoubtedly, a city has the right to invade the limits of an area for the purpose of constructing sewers, laying gas or water mains, or using the entire street for any usual public improvement; but so long as such an area is not invaded by the necessities of the public, it is the duty of the city to recognize the rights of the private proprietor, and exercise ordinary care in making and maintaining its improvements. The owner of the area and the city must each exercise ordinary care in the enforcement of their respective rights, and whether or not they have done so will depend upon the facts and circumstances of each particular case. Possibly, in this action the mutual rights and obligations of the contending parties ¹²⁰ were not as clearly defined by the court's charge as they should have been; but defendant is not in position to complain, having failed to request any instructions and preserve exceptions to the instructions that were given. Finding no reversible error, the judgment of the circuit court is affirmed.

STREETS—ABUTTING OWNERS—RIGHTS OF.—An abutting owner on a public street is presumed to own the soil to the center of the street, subject only to the public easement: Note to *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 55 Am. St. Rep. 946; and is entitled to every right and advantage in that part of the street in which he owns the fee, not required by the public: *White v. Northwestern etc. R. R. Co.*, 113 N. C. 610, 37 Am. St. Rep. 639.

STREETS—DRAINS AND GUTTERS—SURFACE WATER—INJURY—LIABILITY.—A city or town is answerable in damages for its negligence in allowing its drains and gutters to become choked and clogged up, where injury is thereby caused to a lotowner from an overflow of surface water, except when it is due to an unusual storm or flood: *Clay v. St. Albans*, 43 W. Va. 539, 64 Am. St. Rep. 883; *Brunswick v. Tucker*, 103 Ga. 233, 68 Am. St. Rep. 92.

INSTRUCTIONS.—THE VAGUENESS of an instruction cannot be complained of by a party who did not request an instruction embodying his views upon the point: *Ferguson v. State*, 52 Neb. 432, 66 Am. St. Rep. 512.

OWEN v. BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY.

[11 SOUTH DAKOTA, 153.]

LIENS—PRIORITY OF CHATTEL MORTGAGE OVER CARRIER'S LIEN.—The lien of a chattel mortgage has priority to that arising in favor of a common carrier for freight subsequently earned.

CHATTEL MORTGAGES—ALLOWING MORTGAGOR TO REMAIN IN POSSESSION.—The fact that a chattel mortgagor is permitted to remain in possession of the property, such as a "merry-go-round," and to move it from place to place, for use within the state, is not equivalent to consent, upon the part of the mortgagee, that the lien of a carrier for transporting the property shall be paramount to the lien of the mortgage.

Action of claim and delivery brought by W. H. Owen and C. A. Margeson, partners doing business under the firm name and style of Owen & Margeson, against the defendant railway company. There was a judgment for the plaintiffs, and the defendant appealed.

George W. Case, for the appellant.

D. C. & W. R. Thomas, for the respondents.

153 FULLER, J. Mortgagees brought this action in claim and delivery to recover the possession of a portable contrivance called a "merry-go-round," consisting of revolving chariots and wooden horses, operated upon a platform by a steam engine, all of which the defendant, a common carrier, detains in order to maintain its lien for transportation at the request of a mortgagor in possession. As we view the record, the only question essential to a determination of this appeal by the defendant from a judgment in favor of plaintiffs is whether the lien of a chattel mortgage properly filed is prior to that given by statute to a common carrier for freight subsequently earned. In the case of *Wright v. Sherman*, 3 S. Dak. 290, this **154** court having held the lien for pasturing mortgaged stock received from the mortgagor inferior to the lien of a properly filed mortgage, the question must be considered settled in this jurisdiction, unless, upon principle, a material distinction exists between the lien of a railroad company for carrying and that of an agister for caring for personal property previously mortgaged. The essential facts are that the mortgage was executed

on the nineteenth day of August, 1893, and duly filed in Codington county, where the mortgagors resided, and where appellant now detains the property described in said instrument from the possession of respondents. In addition to the constructive notice thus imparted by public records, appellant actually knew of the existence of the mortgage, and that respondents' agent and attorney was looking after the property before the same was received from the mortgagors at Clear Lake and consigned to one of them at Watertown. Knowledge of such proposed shipment, and the fact that respondents allowed the mortgagors to remain in possession and move the property from place to place for use within the state, is not equivalent to consent upon their part that the lien of appellant should be paramount to this mortgage, and there is nothing in the record amounting to a waiver of their rights thereunder. By waiving its statutory right to demand and receive its charges in advance of the shipment, appellant exposed itself to the risk here encountered, and its lien cannot be regarded superior to the mortgage without violating the fundamental principle that no man can be divested of his personal property without his consent, express or implied. If the rule were as contended for by appellant, a chattel mortgage would afford but scanty security, and common carriers would be, without an obvious distinction ¹⁵⁵ upon principle, relieved from a hazard to which other persons in business are constantly subjected. The doctrine upon which this decision must rest was fully recognized and applied in *Wright v. Sherman*, 3 S. Dak. 290, a case which is amply supported by well-reasoned ancient and modern authority. The following are cases in point: *Robinson v. Baker*, 5 Cush. 137, 51 Am. Dec. 54; *Richardson v. Rich*, 104 Mass. 156, 6 Am. Rep. 210; *State Bank v. Lowe*, 22 Neb. 68; *Jarchow v. Pickens*, 51 Iowa, 381; *Sargent v. Usher*, 55 N. H. 287, 20 Am. Rep. 208. With full knowledge of the existence of the mortgage, upon which respondents had the right to rely, appellant, at the request and presumably for the convenience of the mortgagors, transported the property without first collecting its charges, which, with other facts and circumstances in evidence, sustains, we think, the conclusion of the trial court that as a matter of law its lien is subject and inferior to that of respondents under their mortgage, and the judgment appealed from is affirmed.

LIENS—COMMON-LAW AND STATUTORY—PRIORITY.—That common-law liens override all other rights in the property, while

statutory liens are subordinate to all prior existing rights therein, see *Sullivan v. Clifton*, 55 N. J. L. 324, 39 Am. St. Rep. 652, holding that the lien of a chattel mortgage is superior to the statutory lien of a livery-stable keeper. Compare what is said in *Sargent v. Usher*, 55 N. H. 287, 20 Am. Rep. 208, about a carrier's right, as against the owner, to a lien upon goods which the carrier innocently receives from a wrongdoer, without the consent of the owner, express or implied.

MATHER v. DUNN.

[11 SOUTH DAKOTA, 186.]

COTENANCY—POSSESSION—RIGHT OF AGAINST A STRANGER TO TITLE.—A tenant in common is entitled to the possession of the entire property as against all persons except his cotenant, and has a right, in ejectment, to recover the possession of the whole thereof as against one who has no title.

COTENANCY—EJECTMENT—JUDGMENT FOR POSSESSION OF ENTIRE PROPERTY.—A tenant in common, who brings an action to recover the possession of a mining claim, without making his cotenant a party, and who establishes title to three-fourths of the claim, his cotenant owning the other one-fourth, is entitled, as against the defendants, who do not claim to be his cotenants, to a judgment for the possession of the whole claim.

COTENANCY.—ALL COTENANTS NEED NOT BE MADE PARTIES to an action by one of them to recover the common property, as they are not "united in interest." Their interests are several, and the possession of one is the possession of all.

PARTIES—NONJOINDER—WAIVER OF OBJECTION.—The defendants, in an action by one cotenant to recover possession of the common property, waive the right to raise the question of a defect of parties plaintiff where they fail either to demur, to set up such defect in their answer, or to ask for an instruction upon the question before the case is submitted to the jury. It is too late to raise the question on a motion for a new trial.

Action by Mather against Dunn and another to recover the possession of a mining claim. There was a judgment for the plaintiff, and he appealed from an order granting a new trial.

Edwin Van Cise and Granville G. Bennett, for the appellant.

Rice & Polley, for the respondents.

198 CORSON, P. J. This was an action to recover the possession of a mining claim known as the "Alta Villa lode." The defendants claimed title to the same mining ground by virtue of a location made under the name of the "Lilly B. lode." Verdict and judgment were in favor of plaintiff. On the trial the plaintiff failed to establish his ownership to one-fourth of the Alta Villa lode, but no question was raised as to

this failure prior to the verdict. After the verdict the defendants ¹⁹⁹ moved for a new trial, upon the ground, among others, that plaintiff had failed to prove a title to the whole of the Alta Villa claim. The motion was granted "on the ground stated in said motion, to the effect that the evidence disclosed the fact that plaintiff was not the sole owner of the Alta Villa lode, but only of three-fourths thereof, and that there was a defect of parties plaintiff in said action, that was not waived by defendants' failure to plead the same in their answer. As to all the other grounds set out in said motion, the same were not relied upon, and not passed upon." From this order the plaintiff has appealed.

As will be seen from an inspection of the order, a question of law only is presented for our determination, and that is, Did the court err in granting a new trial upon the ground stated? The verdict of the jury was in favor of plaintiff on all the issues, but they found no damages. Was the plaintiff entitled to a judgment, as against defendants, for the possession of the whole of the Alta Villa lode, notwithstanding he failed to prove a legal title to the entire claim? The contention of the defendants is that he is not, and such was evidently the view of the learned trial court. In this we are of the opinion that the trial court was in error. The plaintiff, in establishing title to three-fourths of the claim, had the right to the possession of the whole of the claim, as against all persons except his cotenant, owning the one-fourth interest. Neither of the defendants claimed to be a cotenant with plaintiff in the Alta Villa lode. The defendants claimed the ground under a separate and distinct location of the Lilly B. lode, and hence the issue was raised by the pleadings as to the priority and validity of these two locations. We must assume, from the verdict of the jury, that ²⁰⁰ they found the Alta Villa claim a valid prior location. The plaintiff, therefore, as a co-owner, was entitled to its possession, as against strangers to that title. Such was the rule at common law: *Hibbard v. Foster*, 24 Vt. 542. And such we understand to be the rule under the code: *Hardy v. Johnson*, 1 Wall. 371; *Brady v. Kreuger*, 8 S. Dak. 464, 59 Am. St. Rep. 771; *Collier v. Corbett*, 15 Cal. 183; *Mahoney v. Van Winkle*, 21 Cal. 552; *Treat v. Reilly*, 35 Cal. 129; *Morenhaut v. Wilson*, 52 Cal. 263; *Weese v. Barker*, 7 Colo. 178; *Webster v. McCarty*, 16 Tex. Civ. App. 160; *Dolph v. Barney*, 5 Or. 191; *Sharon v. Davidson*, 4 Nev. 416. In *Stark v. Barrett*, 15 Cal. 362, Mr. Justice Field, speaking for the supreme court

of California, says: "He was not seised in fee of the premises, as alleged in the complaint, but of the undivided half, which entitled him to the possession of the entire premises, as against all parties but the original cotenant and his grantees, and as a consequence to a recovery in the present action. Under the allegation of seisin in the complaint, it was sufficient for the plaintiff to establish any interest in the premises which gave him right of possession." It is contended by respondents that section 384 of the Code of Civil Procedure of California, which provides that tenants in common may jointly or severally sue, has had a controlling influence upon the California decisions. But we do not so understand them. It will be noticed that the section does not make any provision as to what may be recovered in such an action. Section 5453 of our Compiled Laws contains somewhat similar provisions. The right of one tenant in common to recover the possession of the entire property, as against one who has no title, is based upon the fact that such tenant in common is entitled to the possession of the property, as against all parties except his cotenant.

201 The learned counsel for the respondents call our attention to section 4879 of the Compiled Laws, and insist that that section requires all cotenants to be made parties in actions to recover the property. But counsel overlook the fact that tenants in common are not united in interest, and that their interests are several: 4 Kent's Commentaries, 469. But the possession of one is the possession of all: 4 Kent's Commentaries, 470. But, had we any doubt upon the foregoing question discussed, we are clearly of the opinion that the defendants waived their right to raise this question by a failure either to demur, set up the defect of parties plaintiff in their answer, or ask for an instruction upon the question before the case was submitted to the jury. It was too late to raise the question on a motion for a new trial: Comp. Laws, sec. 4913. See Wait's Annotated Code, sec. 148, and cases cited; also, 17 Am. & Eng. Ency. of Law, 240, and cases cited.

The order of the court granting a new trial was erroneous, and the same is reversed.

EJECTMENT BY COTENANT AGAINST STRANGER TO TITLE.—Each cotenant, irrespective of the character of the tenancy, is, as against all strangers thereto, entitled to the exclusive possession of all the property thereof: Note to Brady v. Kreuger, 59 Am. St. Rep. 777; and may recover such possession in an action of ejectment brought against a stranger to the common title: Note

to *Johnson v. Hardy*, 47 Am. St. Rep. 767; *Newman v. Bank of California*, 80 Cal. 368, 13 Am. St. Rep. 169. But other cases hold that a cotenant suing in ejectment cannot recover possession of the whole property, though such possession is held by a stranger to the title, and that the plaintiff's recovery must be limited to the interest which he proves: *Marshall v. Palmer*, 91 Va. 344, 50 Am. St. Rep. 838; *Johnson v. Hardy*, 43 Neb. 368, 47 Am. St. Rep. 765. Compare the monographic note to *Marshall v. Palmer*, 50 Am. St. Rep. 839-846, on actions by a cotenant to recover possession of the property of the cotenancy.

EJECTMENT BY COTENANT—PARTIES.—A tenant in common may bring ejectment against one who has no title, without joining the remaining cotenants in the action: *Coulson v. Wing*, 42 Kan. 507, 16 Am. St. Rep. 503; but, if the defendant, in an action of trespass to try title to land, establishes title to a part interest therein, the plaintiff is not entitled, as against the defendant, to recover for the benefit of other tenants in common who are not parties to the action: *Boone v. Knox*, 80 Tex. 642, 26 Am. St. Rep. 767.

PARTIES—WAIVER OF DEFECT.—If a defect of parties is not apparent on the face of the petition, and is not taken advantage of by answer, it is waived: *Coulson v. Wing*, 42 Kan. 507, 16 Am. St. Rep. 503.

McCLAIN v. WILLIAMS.

[11 SOUTH DAKOTA, 227.]

APPELLATE PRACTICE—NO PRESUMPTION OF ERROR.—If the record does not disclose the ground upon which a motion for the direction of a verdict in his favor was made or denied, the court's ruling thereon must be sustained if it was correct upon any ground.

INNKEEPERS—LIEN OF UPON PROPERTY OF THIRD PERSONS.—A statute which provides that an innkeeper shall have a lien upon, and the right to detain, personal property placed by his guests under his care, and that baggage and other property "belonging" to any person who shall abscond without paying his bill, may be disposed of by the innkeeper to realize the amount due him, does not give him any lien on property leased by his guest of a third person, and left in the guest's room after his departure.

INNKEEPERS—LIEN UPON THIRD PERSON'S PROPERTY—DUE PROCESS OF LAW.—Under the provisions of the code and constitution of South Dakota an innkeeper cannot have a lien, for the board of a guest, on a third person's property, loaned or leased to the guest, because to allow such a lien would be depriving one of his property without due process of law.

Action of claim and delivery brought by McClain against Williams. There was a judgment for the plaintiff, and the defendant appealed.

W. J. Hooper, for the appellant.

Wellington Brown, for the respondent.

228 CORSON, P. J. This was an action in claim and delivery. Verdict and judgment for plaintiff, and the defendant appealed. The defendant did not controvert the plaintiff's ownership of the property, but he claimed the right to the possession by virtue of a hotel-keeper's lien thereon for a balance due him for board of one Kirk, who brought the property to defendant's hotel. The case was tried to a jury, and a verdict rendered in favor of the plaintiff on all the issues.

Several errors are assigned, but in the view we take of the case, the only question requiring consideration is, Did the defendant have a hotel-keeper's lien upon the property of the plaintiff taken by Kirk to his room in the hotel? This question was properly raised by defendant's motion for the direction of a verdict in his favor, which was denied, and exception taken. The record does not disclose the grounds upon which the motion was made or denied, and hence, if the court's ruling was correct upon any ground, it must be sustained. From the evidence it appears that Kirk boarded at defendant's hotel for some weeks, and while so boarding there he leased the gun in controversy from the plaintiff, and took it to his room in the hotel, in which defendant found it after Kirk had left, and **229** took it into his possession, and claims the right to hold it for Kirk's unpaid board bill. The defendant contends that at common law the innkeeper had a lien, not only upon the property owned by the guest, but upon all property brought with him, and in good faith received by the innkeeper as the property of the guest, and that the code of this state recognizes and adopts this rule. This seems to have been the rule at common law (Jones on Liens, sec. 498), but we are of the opinion that under the provisions of the code of this state the common law has been changed, so far as it affects the property of a third person. The code of this state provides that "in this state there is no common law in any case where the law is declared by the codes": Comp. Laws, sec. 2505. And by section 4802 it is provided: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this territory respecting the subjects to which it relates, and its provisions, and all proceedings under it are to be liberally construed with a view to effect its objects and to promote justice." Section 3686, as amended by chapter 102 of the Laws of 1893, provides: "An innkeeper or keeper of a boarding-house is liable for all losses of or injuries to personal property placed by

his guests or boarders under his care and upon such property the innkeeper or keeper of a boarding-house shall have a lien and right of detention for the payment of such amount as may be due him. . . . 3. Baggage and other property and effects belonging to any person who, after obtaining board, lodging, or other accommodations at any hotel or inn, shall abscond or absent himself or herself from such hotel or inn without having paid for such board, lodging, or other accommodations ²³⁰ may, at the expiration of thirty (30) days, be disposed of by the keeper of such hotel or inn at private or public sale, and the net amount realized from such sale shall be credited to the unpaid account of the absconder." The qualification "belonging" to the guest in the third subdivision is important and shows clearly that the legislature intended to limit the lien to the property of the guest. It is true that the first clause of the section does not contain this qualification or limitation, but the whole section must be construed together. It will not be presumed that the law-making power intended that the lien should attach to property the hotel-keeper was not authorized to sell in satisfaction of the lien. Reading the two provisions of the section together, it seems clear that the defendant's lien could only attach to property belonging to Kirk, and did not attach to property belonging to the plaintiff, though brought to the hotel by Kirk. We think "belonging to" must be deemed to be inserted in the last clause of the first part of the section, as to the hotel-keeper's lien, leaving the hotel-keeper's liability as provided in the first clause of the section. This seems to us to be a fair construction of the section as amended, but, independently of this amendment, we should feel inclined to take the same view of the section. As will be noticed, the provisions of our code "are to be liberally construed with a view to effect its objects and promote justice." A construction that would enable a hotel-keeper to acquire a lien, for his guest's hotel bill, upon the property intrusted to such guest by its owner, would not be promotive of justice, and would, in our opinion, render the section unconstitutional, under the provisions of our state constitution. No person can legally be deprived of his property against his consent, express or implied, except ²³¹ by due process of law. Loaning or leasing personal property to a guest at a hotel, without some agreement, express or implied, that it may be pledged for the board of such guest, or the doing of some act by the owner in reference thereto by which such owner is estopped

from asserting his rights as against the hotel proprietor, will not confer upon such hotel-keeper the right to a lien upon it for his guest's board. The old common-law rule was established centuries ago, when the rights of persons and property were not as clearly understood and defined as they are under our modern system of state constitutions, in which these rights are clearly defined and protected. The customs of the realm which authorized such a lien cannot properly be invoked to sanction a claim that is in contravention of the letter and spirit of our modern system.

While courts of states in which the common law still prevails have held to the old rule, we notice that the court of appeals of Missouri, in a case quite similar to the one at bar, speaking by Mr. Justice Thompson, vigorously questions its applicability to our present system. He says: "Nor are we prepared to agree with those courts which have found a plain principle of justice in a rule of law by which one man's property is confiscated to pay another man's debts. It is, to say the least, doubtful whether the extraordinary liability which the common law imposed upon the innkeeper in respect of goods brought to his inn by his guest furnishes a good reason for such a rule. It is also doubtful whether such a rule is not in conflict with the spirit of those guaranties of the right of private property which are embodied in American constitutions. It would be beyond the power of the legislature to pass a law under which the property of one man should be arbitrarily ²³² taken from him and given to another man: *Loan Assn. v. Topeka*, 20 Wall. 655. If the legislature could not pass such a law, we are not prepared to sanction a course of reasoning by which the conclusion is arrived at that the legislature intended to preserve such a rule of common law, by enacting a statute, the terms of which, read in accordance with their sense, import the contrary. Again, the liability of a common carrier at common law is precisely that of an innkeeper. He is liable for the loss or damage of the goods committed to him for carriage happening from every other cause except the act of God or the public enemy. Both the liability of the carrier and that of the innkeeper were grounded at common law upon what was called the 'custom of the realm.' They were co-extensive with each other, had their origin in the same source, and rested upon the same considerations of public policy. And yet modern American courts have not hesitated to declare that a common carrier has no lien for the carriage of goods which

he has innocently received from a wrongdoer, without the consent of the owner, express or implied: *Fitch v. Newberry*, 1 Doug. (Mich.) 1, 40 Am. Dec. 33; *Robinson v. Baker*, 5 Cush. 137, 51 Am. Dec. 54; *Stevens v. Worcester R. R. Co.*, 8 Gray, 262; *Clark v. Lowell etc. R. R. Co.*, 9 Gray, 231. Upon the whole, we are satisfied that the lien of a hotel or inn keeper does not exist in this state in such a case as the present": *Wyckoff v. Hotel Co.*, 24 Mo. App. 382.

Giving to the hotel-keeper a lien upon the baggage and effects belonging to his guest is, in our opinion, as far as the legislature would have a right to go, and as far as it was its intention to go in the passage of the law in question. The court was therefore clearly right in denying the motion of the defendant, and the verdict of the jury was right in finding for the plaintiff. The judgment of the circuit court is affirmed.

INNKEEPERS—LIEN OF, ON THIRD PERSON'S PROPERTY—DUE PROCESS OF LAW.—Under a statute which gives a lien to innkeepers on all property "belonging to or under the control of their guests which may be in such hotel," they have a lien on samples and their receptacles carried by a traveling salesman, although such property is received with a knowledge that it does not belong to the guest or salesman, but to his employer; and such a statute is not unconstitutional as depriving the owner of his property without due process of law. It simply provides for a lien and a possession without making provision as to how the lien shall be enforced: *Brown Shoe Co. v. Hunt*, 103 Iowa, 586, 64 Am. St. Rep. 198. But compare the note to this case, showing that notice to the innkeeper that his guest does not own the property in the latter's possession, generally deprives the innkeeper of his lien thereon. The lien of an innkeeper extends to the property of a third person, held by the guest as bailee, and brought within the inn, unless he knew it was not the property of the guest: *Cook v. Cane*, 13 Or. 482, 57 Am. Rep. 28, and note.

JOHNSON v. GLIDDEN.

[11 SOUTH DAKOTA, 237.]

PARENT AND CHILD—COMPLAINT FOR NEGLIGENT USE OF GUN BY DEFENDANT'S MINOR SON.—A complaint, in an action to recover damages for injuries caused by the alleged negligence of the defendant's minor son in the use of a gun, states a cause of action where it alleges that the defendant purchased the gun and gave it to his son; that the child used it negligently, which fact was known to the defendant; and that the father encouraged, countenanced, and consented to such negligent use.

PARENT AND CHILD—ACTION FOR NEGLIGENT USE OF GUN BY DEFENDANT'S MINOR SON.—In an action to recover for injuries caused by the alleged negligent use of a gun in

the hands of the defendant's minor son, where one of the material issues is, whether the son was in the habit of using the gun in a reckless manner, it is proper to admit evidence which tends to prove that he used the gun negligently on other occasions; and the father's knowledge of his son's culpable conduct may be established by other witnesses than those who testify concerning the acts of his son.

INSTRUCTION, THOUGH ERRONEOUS, DOES NOT JUSTIFY A REVERSAL, WHEN.—An erroneous instruction does not justify a reversal of judgment for the plaintiff, where it is followed by such plain and explicit directions regarding the facts necessary to a recovery by the plaintiff that it is impossible to believe that the verdict was influenced thereby.

PARENT'S LIABILITY FOR CHILD'S NEGLIGENT USE OF A GUN.—In an action to recover damages for injuries resulting from the reckless use of a gun by the defendant's minor son, evidence that the defendant kept a shotgun in his house which his son was permitted to use whenever he desired; that the son had frequently used the gun prior to the accident in question; that he used it in a reckless and dangerous manner when the plaintiff was injured, and had so used it upon other occasions; and that the defendant, though he knew of his son's using the gun in a dangerous manner, permitted him to continue such use, justifies a verdict for the plaintiff.

Action by Charlotte Johnson against Arthur J. Glidden for damages for injuries resulting from the alleged negligent use of a gun by the defendant's minor son. There was a judgment for the plaintiff, and the defendant appealed.

A. W. Burt, for the appellant.

H. G. Warnock, for the respondent.

238 HANEY, J. Plaintiff's cause of action is thus stated in her complaint: "1. That Earnest Glidden is the son of said defendant, and was on the seventeenth day of August of the age of thirteen years, living at home with his said father, and under his custody, care, and control; 2. That prior to said seventeenth day of August, 1895, said defendant carelessly and negligently purchased ²³⁹ and gave to said Earnest Glidden a certain firearm, known as a gun, which said Earnest Glidden was in the habit of using in a careless and negligent manner, so as to endanger the life and property of persons about him, all of which was well known to this defendant, and who encouraged, countenanced, and consented to his carrying said gun and in so using it in said careless and negligent manner; 3. That on the said seventeenth day of August, 1895, this plaintiff was watering a colt on her own premises, when said Earnest Glidden came along with his gun, and, against the request of this plaintiff, carelessly and negligently fired said gun

in front of said colt; that said colt thereby became frightened and ran away, and this plaintiff, without any fault of her own, became entangled in a picket rope attached to said colt, and was dragged for a long distance over the prairie, and was severely injured, in that her flesh was badly bruised and lacerated, and her back was strained, so, as she believes, to be permanently injured; 4. That by reason of said injuries she suffered great bodily pain, and was confined to her bed for a long time, and was and still is unable to do her housework, or any work, and is, as she believes, permanently injured and otherwise greatly injured, and was compelled to spend one hundred dollars for medical attendance, nursing, and help about the house, to her damage of five thousand dollars." The allegations of the complaint are denied, except as to the first paragraph, and defendant alleges that the plaintiff was guilty of contributory negligence.

Does the complaint state a cause of action? It was not assailed until the trial began, and it must be liberally construed. Our Civil Code provides that "neither parent or child is answerable, as such, for the act of the other": Comp. Laws, sec. 240 2620. It is a rule of the common law that "a father is not liable in damages for the torts of his child committed without his knowledge, consent, participation, or sanction, and not in the course of his employment of the child": Schouler on Domestic Relations, sec. 263. The allegations of the complaint connecting defendant with the injurious act of his minor child are these: 1. He purchased and gave him a gun: 2. The child used it negligently; 3. The father knew he was so using it; and 4. He encouraged, countenanced, and consented to such negligent use. It may be conceded that it is not negligence *per se* for a father to furnish his son, aged thirteen years, with a gun, or permit him to use one, if the boy uses it with ordinary care and the father is justified in presuming that it will be so used; but, if he knows that his son is using the firearm in such a careless and negligent manner as to endanger the life and property of persons about him, it is certainly his duty to interpose his parental authority, and prevent, if possible, a course of conduct on the part of his child which is likely to produce injury to others. In a case in Wisconsin, where two minor sons of the defendant came out of their father's house, and fired off a pistol, and shouted, and so frightened the plaintiff's horses that they jumped suddenly forward and threw a person out of the seat, and injured her, the court employs this language: "It will be

seen by an examination of the record that it became important for the plaintiffs to connect the father with the acts of his young sons, which the plaintiffs allege caused the injury complained of, and for this purpose the plaintiffs offered evidence tending to prove that the sons had frequently, before the day upon which the accident happened, called abusive names, shouted, and frequently discharged firearms when persons were ²⁴¹ passing the house of the defendants, and that this was often done in the presence of their father. All evidence of this kind was excluded. This, we are inclined to hold, was error. If the father permitted his young sons to shout, use abusive language, and discharge firearms at persons who were passing along the highway in front of his house, he permitted that to be done upon his premises which in its nature was likely to result in damage to those passing; and, when an injury did happen from that cause, he was not only morally, but legally, responsible for the damage done": *Hoverson v. Noker*, 60 Wis. 511, 50 Am. Rep. 381. The principle thus announced is applicable to the case at bar. If, as alleged, defendant's son was in the habit of using the gun given him by his father in a dangerous manner, and defendant knew of such use, it was his moral and legal duty to prevent a continuation of such conduct; and it is immaterial whether his knowledge was derived from seeing his son's acts of negligence, or from being informed of them by other persons. His culpability consisted in permitting his son to continue in a course of conduct which in its nature was likely to result in damage to those with whom his son came in contact. If he knew his child was using the gun recklessly, as an ordinary intelligent person he must have apprehended the natural consequences of such recklessness; and, as a good citizen, he should have made a reasonable effort to prevent such consequences. On the contrary, it is alleged that he encouraged, countenanced, and consented to the manner in which his son was carrying and using the gun. We think defendant's objection to the introduction of any evidence under the complaint was properly overruled.

²⁴² It follows from what has been stated that the court did not err in admitting evidence tending to prove that the son of defendant used the gun negligently on other occasions than that involved in this case. One of the material issues was whether he was in the habit of using the gun in a reckless manner, and the only way to establish such fact was by evidence showing how he acted when using it. Of course, it was necessary to

show that defendant knew of his culpable conduct, but such knowledge could be established by other witnesses than those who testified concerning the acts of his son. The natural order of proof would be to first show acts of negligence, and then bring knowledge of any or all of such acts home to the father.

The charge of the court, taken as a whole, substantially conforms to the law as herein announced. As a preliminary and general declaration of a parent's liability, the court uses this language: "You will understand as a proposition of law that a father, as such, is not liable for the ordinary acts of his infant son." Standing alone and unqualified by other portions of the charge, this sentence does not correctly state the law, and the use of the word "ordinary" might mislead a jury; but the words quoted are followed by such plain and explicit directions regarding the facts necessary to a recovery by plaintiff that it is impossible to believe that the verdict was influenced by the preliminary statement given above. The language of the court is as follows: "In order to hold the father liable, you must be satisfied by a preponderance of the evidence that the boy had been repeatedly careless in the use of the gun as claimed by this plaintiff. You must further find by a preponderance of the evidence that after Mr. Glidden, this defendant, the father, had been informed and notified of the fact that this ²⁴³ boy was careless, negligent, and reckless, in the use of this firearm, that he did, with knowledge of these facts, cause and he thereafter put the means of doing mischief in his hands, by permitting him to take this gun; then he would be liable and responsible for such damages the boy may have inflicted by reason of the careless use of the gun. Thus, you will see the necessary things for the plaintiff in this case to prove in order to recover are these: First, that she was injured as she alleges; that this injury was caused by reason of the carelessness and negligence of this boy; that the boy had been careless and negligent for some period of time before this; that the father had full knowledge of this fact; and that, with full knowledge of this fact, he put the means of doing mischief in this boy's hands by allowing him or permitting him to take this gun and go where he pleased with it. If all these facts are established, and, further, if it should appear that the plaintiff herself was without any negligence at the time of this accident, then the plaintiff would be entitled to a verdict at your hands for such damages as she may have sustained. If any of these essential facts are not established by the testi-

mony in this case, then the plaintiff cannot recover, and your verdict should be for the defendant."

Finally, it is contended that the evidence is insufficient to sustain the verdict. In discussing this phase of the case it must be remembered that the jury were at liberty to believe the witnesses for plaintiff, and that every fair and reasonable inference must be drawn from their testimony which can be to sustain the verdict. Viewed in this light, the jury were warranted in finding that the defendant kept a shotgun in his house which his son was permitted to use whenever he desired, ²⁴⁴ and that he had frequently used it prior to the accident in question; that the boy used it in a reckless and dangerous manner when plaintiff was injured, and upon at least two other occasions. In brief, they were justified in finding that the boy had used the gun for some time prior to the accident in a reckless manner, and that his use of it was permitted by the parent. There is sufficient evidence to establish all the elements of plaintiff's cause of action, provided defendant knew his son was in the habit of using the gun in a dangerous manner. The only evidence tending to prove that defendant knew of the manner in which the gun was used by his son is that of the plaintiff, who says: "I told Mr. Glidden that he would [should] take care of his boy; that his boy had been down there and shot at the horses, and scared them loose; and he answered and said, 'Wherever there is a lake the boy has a right to hunt.' I told him that the boy shot after the horses; that is what I told him at the time." This is denied by defendant, but must be accepted as true by this court. If so, defendant was informed that his boy was conducting himself in a most reckless and unlawful manner. Upon receiving this information, in place of investigating the charge, with a view to prevent a continuation of his son's reckless conduct if found to be true, he seems to have sanctioned it; and the fact that such conduct continued indicates that he did nothing to prevent it. He was informed that his son was pursuing a course of conduct which in its nature was likely to produce injury to the persons and property of others; and we think the jury was justified in concluding from all the evidence that he not only failed to exercise his parental authority to prevent a continuation of such conduct, but, by his own conduct, encouraged, countenanced, and consented ²⁴⁵ to the course being pursued by his son. Such was evidently the view of the trial court and jury, and we are not

inclined to disturb the verdict. All the assignments of error have received attention. Finding no reversible error, the judgment of the circuit court is affirmed.

INSTRUCTIONS—HARMLESS ERROR.—Though a charge to the court is erroneous, yet if it manifestly works no injury to the losing party, the judgment will not be reversed: *Note to Teasdale v. Stoller*, 54 Am. St. Rep. 707.

Liability of a Parent for the Acts of His Children.*

At common law and under the civil law, minor children, while both parents are living, are subjected exclusively to the authority of the father: *Gates v. Renfro*, 7 La. Ann. 569; and, at common law, the authorities are clear and uniform that a father is not answerable, in a civil action for damages, for the wrongful acts of his minor children, where they live with him and are under his control, and where the acts complained of were not authorized by the father, were not done in his presence, had no connection with the father's business, were not ratified by him, and from which the father received no benefit. Otherwise expressed, a father is never liable for the wrongful acts of his minor child, unless they are committed with the father's consent or in connection with the business of the latter as his servant or agent: *Edwards v. Crume*, 13 Kan. 348; *Smith v. Davenport*, 45 Kan. 423, 23 Am. St. Rep. 737; *Paul v. Hummel*, 43 Mo. 119, 97 Am. Dec. 381; *Scott v. Watson*, 46 Me. 362, 74 Am. Dec. 457; *M'Calla v. Wood*, 2 N. J. L. 81; *Schlossberg v. Lahr*, 60 How. Pr. 450; *Wilson v. Garrard*, 59 Ill. 51; *Paulin v. Howser*, 63 Ill. 312; *Baker v. Haldeman*, 24 Mo. 219, 69 Am. Dec. 430; *Tift v. Tift*, 4 Denio, 175; *Chandler v. Deaton*, 37 Tex. 406; *Moon v. Towers*, 8 Com. B., N. S., 611; *Schaefer v. Osterbrink*, 67 Wis. 495, 58 Am. Rep. 875; *Shockley v. Shepherd*, 9 Houst. 270. A parent is not answerable for the torts of his minor child, committed in his absence and without his authority or approval: *Scott v. Watson*, 46 Me. 362, 74 Am. Dec. 457; *Chandler v. Deaton*, 37 Tex. 406; *Wilson v. Garrard*, 59 Ill. 51; the rule being that infants themselves are answerable for torts and wrongs committed by them the same as adults: *Wilson v. Garrard*, 59 Ill. 51; *Paul v. Hummel*, 43 Mo. 119, 97 Am. Dec. 381; *Chandler v. Deaton*, 37 Tex. 406; *Scott v. Watson*, 46 Me. 362, 74 Am. Dec. 457; *Tift v. Tift*, 4 Denio, 175.

Thus, a father is not answerable for an assault made by his infant child, though he knew that the child had a vicious disposition: *Baker v. Haldeman*, 24 Mo. 219, 69 Am. Dec. 430; or for the willful act of his minor daughter in setting her father's dog upon the plaintiff's hog, which act caused the hog to be bitten and killed: *Tift v. Tift*, 4 Denio, 175; or for the refusal of a minor son to

*REFERENCE TO MONOGRAPHIC NOTES.

Ratification of child's tort by parent: 50 Am. Rep. 333-336.

AM. ST. REP., VOL. LXXIV.—51

marry a servant girl whom the father had employed, and whom he had persuaded to have sexual intercourse with his son, to whom she was affianced: *Jordan v. Hovey*, 72 Mo. 574, 37 Am. Rep. 447; or for the act of his minor son in prosecuting a servant whom the son suspected of obtaining money from him by false pretenses, where the servant was at first remanded but ultimately discharged: *Moon v. Towers*, 8 Com. B., N. S., 611.

A parent is not answerable for willful trespasses of his infant child, when he neither assents to nor ratifies them: *Paul v. Hummel*, 43 Mo. 119, 97 Am. Dec. 381; *Paulin v. Howser*, 63 Ill. 312; *Schlossberg v. Lahr*, 60 How. Pr. 450; *Malmberg v. Bartos*, 83 Ill. App. 481; although he had notice of the child's vicious and destructive temper: *Paul v. Hummel*, 43 Mo. 119, 97 Am. Dec. 381. As to unauthorized trespasses, the child sustains the same relation to the father as does a servant: *Paulin v. Howser*, 63 Ill. 312. A father is not answerable for a trespass of his children in crossing the plaintiff's land on their way to and from school, where they could not conveniently, and without traveling a very considerable distance, approach the schoolhouse without passing over his land, and where the children had, for several years, gone that way, with the owner's knowledge: *Wilson v. Garrard*, 59 Ill. 51. A father is not answerable for the act of his minor sons in shooting a third person's mules, unless it is shown that the father was, in some way, implicated as a principal or accessory: *Chandler v. Deaton*, 37 Tex. 406; and where a mare has been negligently shot by the defendant's minor son, the father's subsequent promise, without consideration and not in writing, to pay for the animal, does not make the defendant liable. In such a case the son only is answerable: *Baker v. Morris*, 33 Kan. 580. A parent is not answerable for the negligence of his infant child: *Schlossberg v. Lahr*, 60 How. Pr. 450; and a father is not subject to an action for damages for injuries occasioned by the reckless and unlawful driving of his minor son, as where he runs against a person: *Shockley v. Shepherd*, 9 Houst. 270; *Brohl v. Lingeman*, 41 Mich. 711.

Relationship alone does not make a father answerable for the wrongful acts of his minor child. There must be something besides relationship to connect him with such acts before he becomes liable. It must be shown that he approved such acts, or that the child was his servant or agent. No presumption arises from the relation of parent and child by which the former can be held answerable for the wrongs of the latter, and if there is nothing more than relationship to connect a parent with the wrong of his child, the parent is not liable therefor: *Chandler v. Deaton*, 37 Tex. 406; *Schaefer v. Osterbrink*, 67 Wis. 495, 58 Am. Rep. 875; *Hoverson v. Noker*, 60 Wis. 511, 50 Am. Rep. 381. No general liability of a father for the torts of his minor son exists. Such liability, in general, results only from the rule of respondeat superior when the fact of agency for

the father is proved, and no presumption of agency results from the domestic relationship: *Kumba v. Gilham*, 103 Wis. 312, 315. In cases where a minor child acts as the servant or agent of its father, the latter's liability for the acts of the former is determined by the law of master and servant. The old rule that the master was never liable for the willful or malicious act of his servant is not now the law. He is answerable if the act was done in his master's business, and this is the true test of his liability: *Richberger v. American Exp. Co.*, 73 Miss. 161, 55 Am. St. Rep. 522. But if a servant does a willful, malicious, wrongful, or criminal act, without the master's authority, and not for the purpose of furthering the interests of the master, the latter is not answerable in damages therefor: See monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 85, on acts of servant for which master is not answerable. So, a parent is not answerable for the willful acts of his minor child, not performed in the service of the master, the employer, or the father, where there is nothing to indicate that the child was acting for him, or was under his control: *Shockley v. Shepherd*, 9 Houst. 270; *Brohl v. Lingeman*, 41 Mich. 711. It is held in *Louisville etc. R. R. Co. v. Willis*, 83 Ky. 57, 4 Am. St. Rep. 124, that the duty of a father to educate and maintain his minor son entitles the former to the son's services, and places him in the attitude of a master to the son, or creates between them the relation of master and servant; but to hold a father liable for the wrongful acts of his minor child, it is unquestionably true that the fact of the child's agency for the father must be proved, and it must further be proved that the acts complained of were within the scope of the agency, for no presumption of agency results from the relationship: *Kumba v. Gilham*, 103 Wis. 312. Furthermore, the fact that the child was engaged in some undertaking beneficial to the father is not sufficient to charge the latter with the former's tort, unless the engagement was in accordance with the direction or authority of the father: *Kumba v. Gilham*, 103 Wis. 312, 316. Hence, if a father employs his daughter to write his business letters, he is not answerable for a libelous letter sent by her, without his knowledge, to one of his customers, as that would be outside the scope of her employment: *Harding v. Greening*, 8 Taunt. 42. So, if a father promises to give his minor son, who is living with him, ten cents apiece for all the crows he may kill and directs him to take his gun to a cornfield and to shoot crows there when he has spare time, but the boy, instead of remaining in the cornfield, goes off his father's premises in search of other game, the father is not answerable for his son's negligence in handling the gun, whereby another person is injured, while the boy is several miles away from the cornfield. He is, in no sense, in his father's employ while away on a hunting expedition of his own: *Winkler v. Fisher*, 95 Wis. 355. And where a minor son, who had been permitted to use his father's horse and

wagon without restriction, took them in the absence and without the knowledge of his father on business of his own, left the horse unfastened in the street, and the horse ran away and injured the plaintiff's carriage, the father was held not liable: *Maddox v. Brown*, 71 Me. 432, 36 Am. Rep. 336. So, a father is not answerable for a negligent act of his minor son done without his authority and against his wishes, although such act was done while the object desired by the father, namely, the transportation of his daughter to her school and the return of the team, was being accomplished, as the son, in such a case, could not be said to be engaged upon the business of the father: *Kumba v. Gilham*, 103 Wis. 312.

On the other hand, a father is answerable for all carelessness, negligence, or wrongful acts of his minor child which are committed while the child is in the father's service and acting in that capacity as his agent at the time. Thus, a son is in business for which his father sent him, so that the father is liable for a trespass committed by the son, where the son is sent by his father for cattle in a certain pasture in which they are supposed to be, and, not finding them there, searches for them in the vicinity and selects them from other cattle in a neighboring pasture: *Andrus v. Howard*, 36 Vt. 248, 84 Am. Dec. 680. So, if a minor son contracts with his father to clear a parcel of land, and in doing so negligently burns the property of a third person, the father must respond in damages, the principle being that where a child is engaged in the father's service and in doing work authorized or commanded by him, he is chargeable with loss to others resulting from the negligence of the child: *Teagarden v. McLaughlin*, 86 Ind. 476, 44 Am. Rep. 332. And a father is answerable for injuries which result to another from his minor son's negligence in driving his father's horses and carriage with the latter's approbation, for the son, in such a case, must be regarded as in the father's employment, discharging the duties of a servant: *Lashbrook v. Patten*, 1 Duvall, 317. A father is also subject to an action of trespass for an injury caused by his team when driven by his son, with whom he was riding at the time: *Strohl v. Levan*, 39 Pa. St. 177. The presumption is that a minor living with his father, and using his team and conveyance in and about the father's business, is acting on his behalf and upon his directions until the contrary is made to appear by evidence: *Gerhardt v. Swaty*, 57 Wis. 24, 37. But no presumption of any kind arises from the fact of relationship alone: *Kumba v. Gilham*, 103 Wis. 312. Evidence that a minor son was in the habit of driving his father's team to convey the family to church with the acquiescence of the father and of an older daughter, who, in the father's absence, was in charge of the family, business, and property, is sufficient, presumptively, to charge the father with liability for the son's negligence in driving the team on another occasion: *Schaefer v. Osterbrink*, 67 Wis. 495, 58 Am. Rep. 875. In such cases the question

as to whether the child was in the father's employ at the time of the accident, and whether the act complained of occurred during the course of the employment, is, in each instance, one of fact for the jury: *Schaefer v. Osterbrink*, 67 Wis. 495, 58 Am. Rep. 875. "No contract of hire is necessary to create the relation of master and servant. It is sufficient to create that relation that one charged as servant, whether a son or person in no way related, is permitted habitually to perform the work, drive the team, or otherwise to act as a servant of the owner, according to the circumstances of the case, with the knowledge and consent or acquiescence of the agent in general charge of the business or property of the owner in the absence of the latter": *Schaefer v. Osterbrink*, 67 Wis. 495, 58 Am. Rep. 875. A father is also answerable for the acts of his minor children committed in his presence or on his premises, or where the circumstances show that they were done with his knowledge and by his authority, either express or implied: See principal case; *Dunks v. Grey*, 3 Fed. Rep. 862; *Hoverson v. Noker*, 60 Wis. 511, 50 Am. Rep. 381. Thus, if a father has been enjoined from selling certain patented articles, he is liable to attachment for contempt, where his son, living with him and under his control, subsequently sells such articles: *Dunks v. Grey*, 3 Fed. Rep. 862. So a father who knowingly permits his young children to commit acts on his premises likely to cause injury to travelers passing, as by running out of their father's house, firing off a pistol, and shouting, is answerable therefor, though he did not by words command such acts: *Hoverson v. Noker*, 60 Wis. 511, 50 Am. Rep. 381. In this case the court said: "If a parent permits his very young children to become a source of damage to those who pass the highway in front of his house, he is as much liable for the injury as though he permitted them to erect some frightful or dangerous object near the highway which would frighten passing teams; and, in such case he cannot screen himself by saying that he did not, in words, order the erection to be made. If he made it himself, with the intention to frighten passing teams, he would be responsible for the injury caused by it; and, when he permits his irresponsible children to do it, he is equally liable, because he has the control of his premises as well as of the children, and is bound to restrain them from causing a dangerous thing to be erected on his premises near the highway: and permitting his young son to become an object of fright to teams passing is certainly equally, if not more, reprehensible than permitting an inanimate structure to be placed where it would cause such fright." In this case, the plaintiffs were on their way to church when the acts were committed and the accident happened, the acts being repeated on their return from the church, and, concerning the plaintiffs' offer of evidence tending to prove that the sons had frequently, before the day upon which the accident happened, called abusive names, shouted, and frequently discharged firearms when persons were passing the house of the de-

fendants, and that this was often done in the presence of their father, the court said: "We think the evidence ought to have been admitted in order to connect the father with the acts of the young sons which caused the injury, when the plaintiffs were on their way to church in the morning, as well as when on their return from the church in the afternoon"; *Hoverson v. Noker*, 60 Wis. 511, 50 Am. Rep. 381. So a father was held liable in trover for wood taken at three different times by his minor sons under circumstances which justified the jury in finding that it was taken with the father's knowledge, the court saying: "The minor sons of the defendant, being at the time members of his family, with the defendant's team, at three several times, hauled away the plaintiff's wood. This could hardly have been done without the defendant's knowledge, if it had not his approbation. It was his duty to have restrained them from trespassing on his neighbor's property. *Qui non prohibet, cum prohibere possit, jubet*. And this maxim may be applied, with great propriety, to minor children residing with, and under the control of, their father": *Beedy v. Reding*, 16 Me. 362.

The law requires of persons having in their custody instruments of danger, such as guns and pistols, that they should keep them with the utmost care: *Dixon v. Bell*, 5 Maule & S. 198; and it is a rule that a person who negligently uses a dangerous instrument or article, or causes or authorizes its use by another person, in such a manner or under such circumstances that he has reason to know that it is likely to produce injury, is answerable for the natural and probable consequences of his act to the person injured, who is not himself in fault: *Note to Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 814. But the courts are disinclined to charge a parent with the negligence of his minor child in the use of such instruments, unless he is connected with the act, by approval, consent, or otherwise, as in the principal case. It is ordinarily true that mischief which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong: *Wabash etc. Ry. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193; and it is a general rule, applicable to infants as well as adults, that a party injured by the negligence of another must seek his remedy against the person whose actual negligence it was which caused the injury, and that such person alone is liable: *Engel v. Eureka Club*, 137 N. Y. 100, 33 Am. St. Rep. 692; *Moon v. Towers*, 8 Com. B., N. S., 611. In view of these principles, it is readily perceived that a father cannot be held answerable for injuries occasioned by his minor child's negligent use of a dangerous instrument, unless the parent was, in some way, negligent himself.

It has accordingly been held that, if a father buys an air-gun for his son, nine years of age, and provides him with shot commonly used in such a toy, charging him not to let other boys have it, and the son leaves it in an outhouse, where it is found by another boy,

ten years of age, who is allowed, with the permission of its owner's mother, to use it, and it is by the latter boy shot off, and the shot with which it is loaded hits a man standing in a public street and destroys his eye, the father is not chargeable with negligence in purchasing the gun and giving it to his son, nor is he answerable, for any reason, to the person thus injured: *Chaddock v. Plummer*, 88 Mich. 225, 26 Am. St. Rep. 283. A parent is not guilty of negligence per se in buying and giving to his son, eleven years of age, an air-gun of the kind commonly used by boys as a toy, and shooting with force sufficient to kill or wound a small bird, or dent a board, or destroy the eye of a human being; and such parent cannot be held answerable because his son loaned the gun to another boy, who shot at the plaintiff and struck him in the eye, destroying that organ: *Harris v. Cameron*, 81 Wis. 239, 29 Am. St. Rep. 891. And it has even been held that the father of a child eleven years old is not liable for negligently allowing him to have a loaded pistol, with which he shot another child: *Hagerty v. Powers*, 66 Cal. 368, 56 Am. Rep. 101. This, however, is an extreme case, and its soundness is doubtful. It is opposed to the doctrine of the principal case, and seems to have been decided upon the broad ground that a parent is not answerable, in any event, for the acts of his minor children under his care which it was in his power to prevent.

A father cannot be held answerable for the wrongful acts of his minor children where the evidence is insufficient to establish previous authority or subsequent ratification of the acts by him: *Moon v. Towers*, 8 Com. B., N. S., 611; *Baker v. Morris*, 33 Kan. 580; *Kumba v. Gilham*, 103 Wis. 312. But, while a parent is not answerable for the independent torts of his child, he is answerable where he has ratified them. Consequently, he must answer for trover and conversion committed by his child, where he had knowledge of the act of conversion, and continued to enjoy its benefits: *Hower v. Ulrich*, 156 Pa. St. 410; *Beedy v. Reding*, 16 Me. 362. If a minor son takes up an estray without the consent or knowledge of his father, he becomes a trespasser, and his father's subsequent ratification of the act merely confirms the trespass. It cannot, therefore, be set up, in an action of replevin to divest the plaintiff of his property: *Newsom v. Hart*, 14 Mich. 233, 236.

Under the civil law, a father is answerable for the wrongful act of his minor child, who is under his dominion. Hence, he is liable where his minor son intentionally or carelessly shoots another person, not in self-defense: *Marionneaux v. Brugier*, 35 La. Ann. 13; *Carmouche v. Bouis*, 6 La. Ann. 95, 54 Am. Dec. 558; and the father's liability for the act of his minor child is not affected by the fact that, at the time of the act, the parent was momentarily absent from the house; nor is it affected by the tender age of the minor: *Mullins v. Blaise*, 37 La. Ann. 92. Compare what is said in *Baker v. Haldeman*, 24 Mo. 219, 69 Am. Dec. 430; *Hagerty v. Powers*, 66 Cal. 368, 56 Am. Rep. 101, on the father's liability, under the Roman law, for the acts of his children. But a minor, while obey-

ing a sheriff's command to serve on a posse comitatus, is not subject to paternal authority. Hence, his father is not answerable in damages for an injury then accruing from a negligent shooting by the minor: *Coats v. Roberts*, 35 La. Ann. 891.

DANFORTH v. MCCOOK COUNTY.

[11 SOUTH DAKOTA, 258.]

TAXES ARE NOT "DEBTS," within the meaning of a statute which exempts timber culture claims from debts contracted prior to the issuing of the final certificate.

TAXES UPON PERSONAL PROPERTY—LIEN FOR, UPON LAND SUBSEQUENTLY ACQUIRED—TIMBER CULTURE CLAIM.—Under a statute which makes personal property taxes a lien on real estate owned or thereafter acquired by the person assessed, a timber culture claim is, after the issuance of the final certificate, subject to a lien for personal property taxes assessed to the owner before the issuance of the certificate, because the land, after the entry, is private property.

TAXES UPON PERSONAL PROPERTY—LIEN FOR—SUBSEQUENT STATUTE.—A statute which prescribes a mode of making assessments, and the levy and collection of taxes, does not affect personal property taxes which became a lien before the passage of the statute.

TAXES UPON PERSONAL PROPERTY—SALE OF LAND FOR—WHAT DOES NOT INVALIDATE.—A sale of land for personal property taxes is not void, under the statutes of South Dakota, because of an officer's failure to collect such taxes by distraint and sale of personal property, or by his failure to make a return showing that he cannot make such taxes out of the personal property of the person owing them.

TAXES—RECEIPT AS EVIDENCE—PAYMENT BEFORE LAW WAS APPROVED.—A STATUTE providing that a tax receipt shall be conclusive evidence that all prior taxes have been paid does not apply to a payment made before the law was approved, or to a receipt for such payment.

TAXES—RECEIPT AS EVIDENCE—REDEMPTION AS EVIDENCE OF PAYMENT.—A STATUTE making a tax receipt conclusive evidence that all prior taxes have been paid applies only to the payment of taxes in the ordinary way, and cannot be extended to a redemption of property from a tax sale. In other words, such redemption is not conclusive evidence that all prior taxes have been paid.

Action by Danforth against McCook county and another to cancel a certificate of tax sale. There was a judgment for the plaintiff, and the defendants appealed.

M. A. Butterfield, for the appellants.

A. C. Biernatzki, for the respondent.

²⁶¹ CORSON, P. J. In 1880 one Kemis entered a timber claim in McCook county, and in 1890 received his final receipt, and in 1893 a patent for the same. After the issuance of a patent Kemis sold and transferred the property to the plaintiff. During the years from 1882 to 1892, inclusive, personal property taxes were assessed against said Kemis, of which only the taxes assessed for the year 1886 were paid. In 1896 the county auditor brought forward these delinquent personal taxes against Kemis, and advertised and sold the real property so entered as a timber claim for the same, together with the real estate taxes on said real property for the year 1895, for the sum of three hundred and forty-four dollars and sixty-five cents, and issued to the county a certificate of sale therefor. The plaintiff, claiming that the real property was only liable for the real property tax for 1895, and the personal taxes assessed against Kemis for the year 1893, amounting to ²⁶² forty-nine dollars and sixty-five cents, tendered that sum to the county treasurer, who refused to accept the same. Thereupon plaintiff brought this action to compel the treasurer to accept said sum and for a cancellation of said certificate of sale.

The court concluded, as matter of law: "1. That the personal tax of Thomas Kemis for the years 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, and 1891 are not, and never were, a lien or liens upon the premises described in the complaint. 2. That the sale of the premises mentioned and described in the complaint, and for which the certificate of sale in this action was issued, so far as the said sale was for the satisfaction or collection of personal taxes for the years mentioned in paragraph 1 of these conclusions of law, is null and void. . . . 4. That at the time of the treasurer's sale mentioned in the complaint, on November 5, 1896, the said real estate sold was not liable for the satisfaction of any taxes, except the taxes assessed against the same for the year 1895, and the personal tax of Thomas Kemis for the years 1892 and 1893."

Judgment was thereupon entered for the plaintiff that, upon payment of forty-nine dollars and sixty-five cents and eight dollars and sixty-five cents for personal taxes assessed against said Kemis for the year 1892, the certificate be canceled. From this judgment and order denying a new trial the defendants appealed.

The learned circuit court evidently took the view that, as the property was a timber claim, the personal property taxes assessed against Kemis prior to the issuance of the patent there-

for never became a lien thereon under the provisions of section 4, chapter 190, of the United States Laws of 1878, which reads as follows: "That no land acquired under the provisions of this act shall in any event become liable to the satisfaction of any ²⁶³ debt or debts contracted prior to the issuing of the final certificate therefor": 20 Stats. 114. The appellants contend that, upon the issuing of the final certificate, the land became the property of Kemis, and that, personal property taxes not being debts within the meaning of the statute, the lien for these taxes assessed to said Kemis immediately attached to the property. The respondent insists that though a "tax" may not in its ordinary acceptation be a "debt," it clearly comes within the meaning of the term "debt or debts," as used in that section, and that the section must be so construed to carry into effect the manifest intention of Congress in making the provision. This court held in *Iowa Land Co. v. Douglas Co.*, 8 S. Dak. 491, that a "tax" is not a "debt" in the ordinary sense in which that term is used, but is a charge or burden imposed upon the property for the benefit of the public, and we are of the opinion that they are not "debts" within the meaning of this statute. The term, "debt," while not having a very clearly defined meaning in the law, has never, so far as our research extends, been held to include taxes. The author of the subject of "Taxation" in the American and English Encyclopedia of Law says: "A tax differs from an ordinary debt, in that its obligation does not depend upon contract. Generally, in the absence of statute, the collection of a tax is not enforceable by an action of debt; nor, in the absence of statute, does it carry interest; nor is it the subject of setoff against an indebtedness of the taxing district to the taxpayer; nor is its nature as a tax affected by the fact that the statute authorizing its imposition authorizes the institution of an action for its recovery. Taxes are not assignable as debts; nor are they provable in bankruptcy as such; nor are they within the purview ²⁶⁴ of statutes relating to imprisonment for debt. And the repeal of a statute imposing a tax is not within the meaning of constitutional provisions against the passage of laws impairing the obligation of contracts": 25 Am. & Ency. of Law, 12. In support of these propositions, the learned author cites a large number of authorities, only two of which we deem it necessary to notice. In *Meriwether v. Garrett*, 102 U. S. 472, the supreme court of the United States says: "Taxes are not debts. It was so held by this court in the case of *Lane Co. v. Oregon*, 7 Wall. 71. Debts are obligations for the payment

of money, founded upon contract, express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate in invitum. Nor is their nature affected by the fact that in some states—and we believe in Tennessee—an action of debt may be instituted for their recovery. The form of procedure cannot change their character: *Augusta v. North*, 57 Me. 392, 2 Am. Rep. 55; *Camden v. Allen*, 26 N. J. L. 398; *Perry v. Washburn*, 20 Cal. 318.” In the case of *Lane Co. v. Oregon*, 7 Wall. 71, referred to in the foregoing opinion, the question of whether or not the term “debt” included a tax was so fully considered and discussed that we quote quite fully from the opinion. In that case the court says: “What, then, is its true sense? The most obvious and, as it seems to us, the most rational answer to this question is, that Congress must have had in contemplation debts originating in contract or demands carried into judgment, and only debts of this character. This is the commonest and most natural use of the word. Some strain is felt upon the understanding when an attempt is made ²⁶⁵ to extend it so as to include taxes imposed by legislative authority, and there should be no such strain in the interpretation of a law like this. We are the more ready to adopt this view because the greatest English elementary writers upon law, when treating of debts in their various descriptions, give no hint that taxes come within either (1 *Blackstone’s Commentaries*, 475, 476), while American state courts of the highest authority have refused to treat liabilities for taxes as ‘debts,’ in the ordinary sense of that word, for which actions of debt may be maintained. The first of these cases was that of *Peirce v. Boston* (1842), 3 Met. 520, in which the defendant attempted to set off against a demand of the plaintiff certain taxes due to the city. The statute allowed mutual debts to be set off, but the court disallowed the right to set off taxes. This case went, indeed, upon the construction of the statute of Massachusetts, and did not turn on the precise point before us, but the language of the court shows that taxes were not regarded as ‘debts, within the common understanding of the word. The second case was that of *Shaw v. Peckett*, 26 Vt. 486, in which the supreme court of Vermont said: ‘The assessment of taxes does not create a debt that can be enforced by suit, or upon which a promise to pay interest can be implied. It is a proceeding in invitum.’ The next case was that of *Camden v. Allen* (1857), 26 N. J. L. 398. That was an action

of debt brought to recover a tax by the municipality to which it was due. The language of the supreme court of New Jersey was still more explicit. 'A tax, in its essential characteristics,' said the court, 'is not a debt, nor in the nature of a debt. A tax is an impost levied by authority of government upon its citizens or subjects for the support of the state. ²⁰⁶ It is not founded upon contract or agreement. It operates in invitum. A debt is a sum of money due by certain and express agreement. It originates in and is founded upon contracts, express or implied.' These decisions were all made before the acts of 1862 were passed, and they may have had some influence upon the choice of the words used. Be this as it may, we all think that the interpretation which they sanction is well warranted. We cannot attribute to the legislature an intent to include taxes under the term 'debts' without something more than appears in the acts to show that intention. The supreme court of California in 1862 had the construction of these acts under consideration in the case of *Perry v. Washburn*, 20 Cal. 350. The decisions which we have cited were referred to by Chief Justice Field, now holding a seat on this bench, and the very question we are now considering, 'What did Congress intend by the act?' was answered in these words: 'Upon this question we are clear that it only intended by the term "debts" public and private, such obligations for the payment of money as are founded upon contract.' In whatever light, therefore, we consider this question—whether in the light of the conflict between the legislation of Congress and the taxing power of the states, which the interpretation insisted on in behalf of the county of Lane would occasion, or in the light of the language of the acts themselves, or in the light of the decisions to which we have referred—we find ourselves brought to the same conclusion, that the clause making the United States notes a legal tender for debts has no reference to taxes imposed by state authority, but relates only to 'debts' in the ordinary sense of the word, arising out of simple contracts, or contracts by specialty, which include judgments and recognizances." ²⁰⁷ As this case was decided in 1868, ten years prior to the passage of the timber culture law of 1878, we may reasonably conclude that Congress used the word "debt" in the act as interpreted by that court.

By section 1612 of the Compiled Laws, it is provided that "taxes due from any person upon personal property shall be a lien upon any real property owned by such person or to which he may acquire a title." The same provision is contained in

section 96, chapter 14, of the Laws of 1891, but with a limitation upon its exercise. A large portion of the personal taxes involved in the case at bar accrued prior to the passage of the law of 1891, and must be governed by the section above quoted. The final certificate mentioned in the timber culture act of 1878 having been issued to Kemis in January, 1890, he thereafter, for the purposes of taxation, became the owner, and the land became subject to the lien for personal taxes assessed prior thereto: *Witherspoon v. Duncan*, 4 Wall. 210. In that case the supreme court says: "In no just sense can lands be said to be public lands after they have been entered at the landoffice and a certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer and is a void act. According to the well-known mode of proceeding at the landoffices (established for the mutual convenience of buyer and seller), if the party is entitled by law to enter the land, the receiver gives him a certificate of entry, reciting the facts, by means of which in due time he receives a patent. The contract of purchase is complete when the certificate of entry is executed and delivered ²⁰⁸ and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title. This question was fully considered by this court in *Carroll v. Safford*, 3 How. 450, and the views we have presented only reaffirm the doctrine of that case. But it is insisted that there is a difference between a cash and a donation entry; that the one may be complete when the money is paid, but the other is not perfected until it is confirmed by the general landoffice and the patent issued. That Congress has the entire control of public lands, can dispose of them for money, or donate them to individuals or classes of persons, cannot be questioned. If the law on the subject is complied with, and the entry conforms to it, it is difficult to see why the right to tax does not attach as well to the donation as to the cash entry. In either case, when the entry is made and certificate given, the particular land is segregated from the mass of public lands, and becomes private property. In the one case, the entry is complete when the money is paid; in the other, when the required proofs are furnished. In neither can the patent be withheld if the original entry was:

lawful. The power to tax exists as soon as the ownership is changed, and this is effected when the entry is made on the terms and in the modes allowed by law."

As the lien for the personal property taxes assessed prior to 1890 attached in January, 1890, these taxes are not affected by the act of March, 1891.

Respondent further contends that the failure of the treasurer to make and file his return as provided by section 96 of the act of 1891 rendered the sale invalid. But this view of the ²⁰⁰ act cannot be sustained. The proviso to said section, read in connection with section 123 of the act, shows clearly that a failure of the treasurer or any other officer to collect the personal tax or to make such return will not render the sale void. Such failure might be a ground for restraining the sale, but does not affect the sale when made.

The respondent also insists that as Kemis paid his real estate tax in 1891, and received the treasurer's receipt therefor, this receipt, under the provisions of sections 82 and 83 of the laws of 1891, was made conclusive evidence that all prior taxes had been paid. But as this receipt was given in January, 1891, and the law of 1891 was not approved until March, 1891, it did not apply to this receipt for or payment of the 1890 tax.

The respondent further contends that in 1892 the property was sold for the unpaid taxes of 1891 assessed against the real property, but no personal tax of said Kemis was included, and that in March, 1891, the plaintiff redeemed the property from this sale, and this was conclusive that all prior taxes had been paid. But, assuming that the provisions of sections 82 and 83 are constitutional, the provisions can only apply to the payment of taxes in the ordinary way, and cannot be extended to include sales for taxes.

Our conclusions are that, upon the facts as stipulated and found, the court erred in its conclusions of law, and that these conclusions should have been in favor of the defendants. The judgment of the circuit court is reversed, and that court is directed to enter judgment dismissing the action.

TAXES ARE NOT "DEBTS," in the ordinary sense of that term: Note to Richards v. Commissioners, 42 Am. St. Rep. 655.

TAXES—PUBLIC LANDS.—After a final homestead certificate to public lands has been issued, entitling the holder to a patent, the lands are subject to state taxation, although the patent has not yet issued: Burcham v. Terry, 55 Ark. 398, 29 Am. St. Rep. 42.

McDONALD v. FULLER.

[11 SOUTH DAKOTA, 355.]

EXECUTION TO ANOTHER COUNTY—AMENDABLE IRREGULARITY.—The failure to insert, in an execution issued to another county than the one in which the judgment was rendered, the date when the judgment was docketed in the county to which the execution runs, is a mere irregularity, and is amendable.

EXECUTION TO ANOTHER COUNTY—DOCKETING OF JUDGMENT—VALIDITY OF EXECUTION.—Under a statute which provides that execution may be issued to the sheriff of the county where the judgment is docketed, an execution issued to a county other than that in which the judgment was rendered is valid, though taken from the clerk's office before the judgment is docketed in the county to which it runs, if it is not delivered to the sheriff for service until after the judgment has been docketed in the latter county.

AN EXECUTION IS NOT ISSUED until delivered to an officer for service.

EXECUTION—APPARENT ALTERATION—PRESUMPTION.—It will be presumed that an apparent alteration in an execution was innocently made prior to the issuing of the writ.

APPELLATE COURT WILL NOT DIRECT JUDGMENT, WHEN.—In cases tried by a jury, an appellate court does not feel justified in directing the entry of any particular judgment. Hence, in an action of claim and delivery against a sheriff, who relies upon an execution, which has been excluded from evidence, and where judgment has been entered upon a verdict directed for the plaintiff, which is reversed on appeal upon the ground that the execution was improperly excluded, the appellate court will not direct a judgment for the defendant, but will remand the case for a new trial.

Action of claim and delivery brought by McDonald against Fuller, sheriff of Butte county, and another. The plaintiff obtained a judgment, from which the defendants appealed.

John R. Wilson, for the appellants.

McLaughlin & McLaughlin, for the respondent.

³⁵⁶ **CORSON, P. J.** This was an action in claim and delivery. A verdict was directed for plaintiff, and from the judgment entered thereon and order denying a new trial the defendant appealed. The appellant was sheriff of Butte county, and sought to justify the seizure and detention of the stock of goods in controversy in this action under and by virtue of certain executions issued to him, as such sheriff, on judgments recovered in Lawrence county, against one Edward McDonald, who he claimed was the owner of said stock of goods. On the trial, the transcripts of the judgments and docketing in two cases were objected to, and excluded by the court, upon grounds not

³⁵⁷ necessary now to be stated, as the main question upon which this decision will be made is fully presented by the record in the third case, of the C. D. Woodward Company against Edward McDonald. An execution issued upon the judgment in that case being offered in evidence, counsel for respondent objected to its reception, on the following grounds: "1. Because the execution is defective, in that it does not show that any transcript has been filed in Butte county; 2. Because it appears from the execution that it was issued on the twenty-third day of September, 1895, and the filing mark of the clerk shows that the transcript was not filed here until September 24, 1895, and therefore the execution was issued prematurely. Plaintiff also objects to this execution, for the reason that there is an alteration in it apparent on the face of it, which is not explained." The objection was sustained, and the ruling of the court is assigned as error.

The first ground does not require much consideration, for the reason that the failure to insert in the execution the date when the judgment was docketed in Butte county constituted mere irregularity, and was amendable, provided the judgment was in fact docketed in Butte county: Freeman on Executions, sec. 64 et seq. The second ground raises a more important question. It is contended by the respondent that the clerk of Lawrence county had no authority to issue the execution until the judgment was docketed in Butte county, and that it was therefore void. The appellant contends that, as the execution was not delivered to the sheriff until after the judgment was docketed in Butte county, it was, in legal effect, issued after the judgment was properly docketed in the latter county. Section 5114 of the Compiled Laws provides that, "when the execution is against the property ³⁵⁸ of the judgment debtor, it may be issued to the sheriff of the county where the judgment is docketed." Was the docketing in Butte county, therefore, a condition precedent, that must be complied with before the clerk was authorized to issue an execution to the sheriff of that county, and was the execution so issued void?

The authorities upon this question seem to be somewhat conflicting. The supreme court of Wisconsin holds that an execution so issued before the judgment is docketed in the county to which the execution runs is void, on the ground that the clerk has no authority to issue it: *Smith v. Buck*, 22 Wis. 577; *Kentzler v. Chicago etc. Ry. Co.*, 47 Wis. 641; *Bugbee v. Lombard*, 88 Wis. 271. But in neither of these cases was the precise ques-

tion we have under consideration before the court, for the reason that in these cases it does not appear that the judgments had been docketed in the proper county at any time. But in the more recent case of *Gowan v. Fountain*, 50 Minn. 264, the supreme court of Minnesota takes a different view, and holds that "an execution issued to a county other than the one in which the judgment was rendered is valid, though taken from the clerk's office before the judgment is docketed in the county to which it runs, but not delivered to the sheriff for service until after the judgment is so docketed." In its opinion that learned court says: "It was issued, in the sense of being taken from the clerk's office, before the judgment was docketed in Chippewa county; but the judgment was docketed in that county before the execution was issued, in the sense of being delivered to the sheriff for service, and this is, in legal contemplation, the date of the issue of an execution. This was, in substance, what was held in *Mollison v. Eaton*, 16 Minn. ³⁵⁹ 426, 10 Am. Rep. 150. It is true that in that case the levy was on personal property, but, as respects the authority to issue an execution to another county, we cannot see how that makes any difference. The practice adopted in the present case has obtained in this state from a very early date. It is an eminently convenient one, and injures nobody. Our conclusion, therefore, is that the execution and the sale under it were valid." It will be observed that the question decided by that court is the precise question presented by the case at bar, and the view taken by that court is sustained by the earlier decisions in *New York. Stoutenburgh v. Vandemburgh*, 7 How. Pr. 229; *Blivin v. Bleakley*, 23 How. Pr. 124. In the late case of *Dunham v. Reilly*, 110 N. Y. 366, the court of appeals held an execution so issued was void. But the facts of that case were not only different from the one at bar, but, when that decision was made, the statute had been materially changed, as will be seen by the opinion. The court says: "By section 1365 of the Code of Civil Procedure, it is enacted that executions against property 'can be issued only to a county in the clerk's office of which the judgment is docketed.' The power to issue the process is given where, in some county, there is the prescribed docket, and only in that event. The language seems to involve both an authority and a prohibition—an authority where the judgment is docketed in any county to issue the execution to that county; and a prohibition, couched in the word 'only,' against any such

issue to a county in whose clerk's office there is no such docket. . . . Here the judgment never was docketed during the life of the process, and not until long after its validity was spent. When the docket was made, there was no execution in existence that could be made good by any mode of amendment, and ³⁶⁰ an effort to amend would be to create a cause of action where none before existed. But there is a further fact to be considered. The cases cited were under the provisions of the old code, section 287 of which provided that, 'when the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed.' This language, which was permissive, and possibly might be deemed only directory, has been changed to the peremptory and mandatory words 'can be issued only.' We must recognize and give effect to the manifest purpose of the altered language." It will be observed that the former section of the New York code is identically the same as our section 5114. The views expressed by the supreme court of Minnesota, that an execution may be regarded as issued when delivered to the officer for service, are supported by well-considered cases: *Pease v. Ritchie*, 132 Ill. 638; *Peterson v. Wayne* Circuit Judge, 108 Mich. 608; *National Bank v. Dwight*, 83 Mich. 191. See, also, 1 *Freeman on Executions*, sec. 25, and authorities cited as to when an execution is void, and when irregularly issued.

It is claimed by counsel for respondent that the decision in *Locke v. Hubbard*, 9 S. Dak. 364, is decisive of this case in favor of respondent. But we do not so regard it. In that case an execution was issued before there was any judgment upon which to base it. The clerk, therefore, had no authority to issue an execution for any purpose. But in the case at bar there was a judgment, and the clerk was authorized to issue an execution thereon to the sheriff of his own county. Being based upon a valid judgment, the execution in this case became effective when the judgment was docketed in the proper county, and before the execution was delivered to the sheriff ³⁶¹ for service. We do not wish to be understood as holding that the execution would be void if delivered to the sheriff, and executed, before the judgment was docketed. That is a question not presented by this record, and therefore is not decided at this time.

It is also contended that the execution was void by reason of an alteration appearing upon its face, which was not explained before it was offered in evidence. But in such a case "the presumption against fraud is applicable, and the court will

proceed on the assumption that the apparent alteration was innocently made, prior to the issuing of the writ": 1 Freeman on Executions, sec. 47. The learned circuit court was clearly in error in excluding the execution in this case, and for this error the judgment must be reversed, and a new trial ordered.

Appellant further contends that if the trial court erred in excluding the execution, and this court so holds, then, upon the facts, this court should direct the court below to enter judgment for appellant, as a motion to direct a verdict was made by appellant in the court below. In a few cases where the trial has been had before the court without a jury, and all the facts have been fully found by the trial court, this court has directed the judgment to be entered upon the ground that, under the facts found, only such a judgment could be legally entered: *Hamlin Co. v. Clark Co.*, 1 S. Dak. 131; *McPherson v. Fargo*, 10 S. Dak. 611, 66 Am. St. Rep. 723. But, ordinarily, in a case tried by a jury we would not feel justified in directing the entry of any particular judgment, though, where the judgment is directed by the trial court, this court, upon a review of the evidence, might affirm such judgment. It may be, and probably is, the fact that as counsel for the respondent succeeded in excluding ³⁶² the execution offered in evidence, thereby leaving the appellant without any justification for his seizure and detention of the property, they did not deem it necessary to offer any further proof in the case; and the learned circuit court directed a verdict for the respondent, presumably upon the theory that the appellant had shown no right to question respondent's title to the property. It is therefore clear that this court should go no further than to grant a new trial, without reviewing the evidence or intimating any opinion upon its weight. The judgment of the circuit court and order denying a new trial are reversed, and a new trial ordered.

Haney, J., dissenting.

EXECUTION TO ANOTHER COUNTY—DOCKETING OF JUDGMENT AS CONDITION PRECEDENT.—To uphold the validity of an execution issued to a county other than that in which the judgment was rendered, it must affirmatively appear that the judgment was docketed, in the county to which the execution runs, prior to the delivery of the writ to the sheriff: *Carson v. Fuller*, 11 S. Dak. 502, post, p. 823.

APPEAL—DIRECTING JUDGMENT.—If the supreme court is able, from an examination of the admitted facts, to direct judgment, it will do so without sending the case back for a new trial: *Taylor v. Bleakley*, 55 Kan. 1, 49 Am. St. Rep. 233.

McCORMICK HARVESTING MACHINE COMPANY
v. HALVORSON.

[11 SOUTH DAKOTA, 427.]

JUSTICE OF THE PEACE—POWER TO ALTER DOCKET AFTER ENTRY OF JUDGMENT.—After a justice of the peace has entered a final judgment upon which a defeated litigant has proceeded with reference to an appeal, the justice has no power to change his docket with respect to the parties or subject matter. Hence, he cannot, of his own motion, change an entry in the docket to show that the action was dismissed on plaintiff's motion, instead of the defendant's, as recited in the entry.

JUSTICE OF THE PEACE—DISMISSAL OF ACTION AFTER CHANGE OF VENUE.—It is reversible error for a justice of the peace, into whose court a case has been brought by the defendant upon a change of venue, to dismiss the action, upon the defendant's ex parte application, seven days after such change, in the absence of any agreement of the parties as to the time of trial, and without the service or issuance of a notice by the justice stating when and where the trial would take place, as required by statute.

Action by the plaintiff company against Halvorson. The defendant appealed from a judgment of the circuit court, which reversed a judgment of a justice of the peace in his favor.

Kate Rochford and J. E. McMahon, for the appellant.

Keith & Warren, for the respondent.

428 FULLER, J. On appeal by plaintiff to the circuit court, a judgment of a justice of the peace dismissing its action, and for costs taxed against it at thirty-two dollars and sixty cents, was reversed; and the defendant, in favor of whom said judgment was rendered, appeals to this court.

The judgment as rendered by the justice, and as shown by his docket when the notice of appeal and proposed statement of the case were filed and served, purports to have been entered upon the ex parte application of the defendant as follows: "This twenty-seventh day of August, 1897, case brought into this court on change of venue from city justice court, and transcript and summons filed, and action docketed; and now, on September 3, 1897, defendant comes into court, and moves the dismissal, without prejudice, of this action, and said action is hereby dismissed, without prejudice, at plaintiff's costs, and judgment is hereby rendered against the said plaintiff and in favor of the defendant for thirty-two dollars and sixty cents. O. A. Fowler, Police Justice." The errors of law then relied upon for a re-

versal on appeal to the circuit court were: "1. That the said police justice, O. A. Fowler, erred in rendering judgment in said action in favor of the defendant and against the plaintiff; 2. That the said police justice, O. A. Fowler, erred in rendering judgment in said action for the dismissal thereof, and for costs in favor of defendant, without having issued any notice to the parties to said action, stating the time and place when and where said action would be tried, and without serving such notice on the said ⁴²⁹ plaintiff, as required by law; 3. That the said justice had no jurisdiction of said action, and had no jurisdiction to dismiss the same, or to render judgment therein, or to take any other step or proceeding in said action; 4. That the said judgment rendered by said justice was without jurisdiction, and is wholly void." Several days after the foregoing steps were taken, counsel for the defendant, ostensibly with the sanction of the justice, but without any notice to plaintiff, altered the docket entry above quoted by striking therefrom the word "defendant," and by inserting in its stead the word "plaintiff"; thus making it appear that the action was dismissed upon plaintiff's motion, instead of that of the defendant. Thereafter, in response to an order to show cause why he should not forthwith certify a true copy of his docket to the circuit court as the same formerly existed, said justice certified that the action was dismissed on plaintiff's motion, and that, upon entering the same upon his docket, a mistake was made by inadvertently using the word "defendant" instead of "plaintiff," and when the error was discovered the change was made, but without the knowledge or consent of plaintiff or its counsel.

By assuming, as we may, that the judgment, as formerly docketed and entered by the justice, was erroneous in the material particulars claimed, and that the change was made in good faith by some one several days later, we are relieved from considering numerous affidavits presented to the trial court involving questions of veracity and moral turpitude, because, in legal significance, the cogent fact is that the alteration was unauthorized and void in any event. After a justice of the peace has once entered a final judgment in his docket, upon which a defeated litigant has proceeded with reference to an appeal, it ⁴³⁰ would be most dangerous to hold that he may, in seclusion, and upon his own motion, review such judgment for the purpose of correcting what he considers to be mistakes. That portion of the record which we deem unnecessary to publish fur-

nishes a striking object lesson, directly in point, as to the disastrous effects of such a doctrine. As a matter of law, the power of the justice to change his docket with respect to the parties or subject matter had ceased, and the attempted change was extrajudicial and without force: *People v. Delaware Common Pleas*, 18 Wend. 558; *Foist v. Coppin*, 35 Ind. 471; *Fox v. Meacham*, 6 Neb. 530; *Foster v. Alden*, 21 Mich. 508. Even in a court of general jurisdiction, a judgment, once entered, must stand until modified, vacated, or disposed of by some process prescribed by law, and every unauthorized alteration may well be disregarded: *Nuckolls v. Irwin*, 2 Neb. 60; 1 Black on Judgments, 163.

Ignoring, as the trial court very properly did, the substitution of the word "plaintiff" for "defendant," it appears that the action was instituted before City Justice A. B. Wheelock, and, at the instance of the defendant, a change of venue was had to Police Justice Fowler, in whose court the papers were filed on the twenty-seventh day of August, 1897. On the third day of the following month, judgment of dismissal, and for costs against plaintiff, was entered upon the ex parte application of defendant, in the absence of any agreement of the parties as to the time of trial, and without the service or issuance of a notice by said justice stating when and where the trial would take place, as required by section 6047 of the Compiled Laws. Under such circumstances, the court was fully justified in reversing the judgment, and in remanding the case for a new trial. The judgment appealed from is affirmed.

JUDGMENTS—AMENDMENT OF.—A court cannot correct a judgment as in fact rendered after the term has passed. The power to amend or change it is then confined to the appellate court: In re Black, 52 Kan. 64, 39 Am. St. Rep. 331, and note showing that a court cannot alter the record of its proceedings.

CARSON v. FULLER.

[11 SOUTH DAKOTA, 502.]

EXECUTION TO ANOTHER COUNTY PRIOR TO DOCKETING OF JUDGMENT.—To uphold the validity of an execution issued to a county other than that in which the judgment was rendered, it must affirmatively appear that the judgment was docketed in the county to which the execution runs prior to the delivery of the writ to the sheriff.

EXECUTION TO ANOTHER COUNTY PRIOR TO DOCKETING—JUSTIFICATION OF SEIZURE BY SHERIFF—REPLEVIN.—When property is seized by a sheriff upon an execution issued to a county other than that in which the judgment was rendered, that officer cannot, in an action of replevin by the owner, justify his seizure by virtue of the execution, where the writ was delivered to him before the judgment was docketed in the county to which the execution runs.

ATTACHMENT—RETURN OF, WHEN NOT A DEFENSE IN REPLEVIN AGAINST OFFICER.—In an action against a sheriff to recover property seized and detained by him under a warrant of attachment, the officer's return is no defense, where it was not made within the time prescribed by statute.

Action of claim and delivery brought by the plaintiff, Carson, who obtained a judgment, and the defendant appealed.

Temple & McLaughlin and T. W. La Fleiche, for the appellant.

Rice & Polley, for the respondent.

503 **CORSON, P. J.** This was an action in claim and delivery to recover the possession of a stock of goods levied upon and in the possession of the defendant as sheriff of Butte county. The sheriff justified his seizure and detention of the goods under and by virtue of two executions issued by the clerk of court of Lawrence county upon judgments recovered in that county against one E. J. Ferrall, and also under and by virtue of a warrant of attachment issued against the said Ferrall. On the trial, the defendant introduced in evidence the judgment-rolls filed in Lawrence county, and proof that transcripts of the original judgment docket were filed in Butte county. The defendant then offered in evidence executions issued by the clerk of said Lawrence county, which were duly objected to, the objection sustained, and the executions and returns thereon excluded, to which ruling of the court the defendant duly excepted. It is disclosed by the abstract that each execution bore date one day prior to the filing of the transcript and docketing of the judgment in Butte county, and it affirmatively appears

from the abstract that the execution in one case was delivered to the sheriff prior to the docketing of the judgment in that county. As to when the other execution was ⁵⁰⁴ delivered to the sheriff, the record is silent; but we must presume, in favor of the ruling of the court below, and in support of the judgment, that it was not delivered to the sheriff until after the judgment was docketed. It not, therefore, affirmatively appearing that the judgments were docketed in Butte county prior to the delivery of the executions to the sheriff, we are of the opinion that the court below ruled correctly in excluding the said executions. This court held in the recent case of McDonald v. Fuller, 11 S. Dak. 355, ante, p. 815, that, in legal effect, an execution is issued when delivered to the sheriff for execution, and the fact that it bears date one or more days prior to the filing of the transcript and docketing of the judgment in the county to which it is issued does not affect the validity of the execution, if not delivered to the sheriff until after the transcript has been filed and the judgment docketed. In that case, the judgment was docketed some three or more days prior to the delivery of the execution to the sheriff, and we think we went as far in that decision in upholding the executions as the statute and law warrant us in doing. In the case at bar, when the executions were delivered to the sheriff they were ineffective, and the court below committed no error in excluding them.

The defendant also sought to justify his seizure and detention of the property under a warrant of attachment issued against Ferrall, the defendant in the attachment suit. On the trial, the warrant of attachment was objected to upon the ground that it was not returned to the clerk within twenty days after the seizure of the property. The warrant of attachment was excluded, and the defendant excepted. It appears that on August 13, 1896, the sheriff seized the property in controversy, ⁵⁰⁵ and that the warrant of attachment issued and placed in his hands was not returned by him until several days after the expiration of the twenty days allowed by law for making his return. The appellant contends that the court erred in excluding the writ of attachment, and sheriff's return thereon, as the statute requiring the sheriff to make such return within twenty days is directory only. The respondent insists that the statute is mandatory, and that, by the failure of the officer to make his return within the time prescribed by law, he deprived himself of a defense which he might have otherwise made available.

Prior to 1887 no time was fixed within which the officer should make his return upon a warrant of attachment, but at the legislative session of that year, section 203 of the Code of Civil Procedure (now section 4999 of the Compiled Laws), was amended by adding thereto the following words: "And such officer shall, within twenty days after making such seizure, file all of said papers, including said inventory and return, with the clerk of the district court who issued the warrant." It would seem, therefore, that prior to 1887 an officer was only required to return his warrant of attachment within a reasonable time. By the amendment, however, the officer is required to make his return within twenty days after making the seizure. The amendment, in effect, fixes a return day for the process, and is mandatory upon the officer. An officer, therefore, seeking to avail himself of the warrant of attachment and return as a defense to an action against him, must show that the return was made within the time prescribed by the statute: 1 Shinn on Attachment, sec. 220a; Waples on Attachment, sec. 259; Drake on Attachment, sec. 210a; Williams v. Babbitt, 14 Gray, 141, 74 Am. Dec. 670; Wilder v. Holden, 24 Pick. 8; Russ v. Butterfield, 6 Cush. 242. The court, therefore, committed no error in excluding ⁵⁰⁶ the warrant of attachment and return thereon; and the appellant, failing to show any justification for the seizure and detention of the goods, as against the plaintiff, is in no position to question plaintiff's title to the property. Hence the judgment of the court below must be affirmed.

The judgment of the circuit court is affirmed.

EXECUTIONS — DOCKETING JUDGMENT — DIRECTORY STATUTE.—A statutory requirement that the date of the docketing of a judgment shall be stated in the execution issued thereon is directory merely. The docketing of a judgment is not an essential condition of its efficacy, except for the purposes of a lien, and is not a condition precedent to issuing execution thereon to an officer where it is rendered or to an officer in any other county: Bernhardt v. Brown, 122 N. C. 587, 65 Am. St. Rep. 725.

WITTE v. KOEPPEN.

[11 SOUTH DAKOTA, 592.]

WITNESSES—COMPETENCY—ACTION AGAINST ADMINISTRATOR.—The word "party," in a statute which prohibits either "party" to an action against an administrator from testifying against the other as to any transaction with, or statement by, an intestate, unless called to testify thereto by the opposite party, is used technically. It excludes those only who are parties to the issue to be tried, and does not include those who are not parties, though they have an interest in the result of the issue. Hence, though one having a claim against an administrator would be incompetent to testify in an action against the administrator, if he had brought the action himself, yet he is competent, after an assignment of his claim, to testify in such action as to transactions between himself and the deceased.

STATUTES—CONSTRUCTION—SPIRIT OF LAW.—A court, in construing a statute, is not at liberty to disregard its plain and express terms upon any theory as to its spirit. When it is plain and unambiguous, courts are not permitted to search for its meaning beyond the statute itself.

APPEAL—WEIGHING EVIDENCE TO SUPPORT VERDICT.—If there is sufficient legal evidence to sustain a verdict, it will not be disturbed on appeal, though the evidence is conflicting.

Action by Witte against A. C. Koeppen, as administrator of the estate of C. F. H. Koeppen, deceased, to recover a money judgment. There was a judgment for the plaintiff, and the defendant appealed.

Davis, Lyon & Gates, for the appellant.

Keith & Warren, for the respondent.

599 CORSON, P. J. This is an action by the plaintiff, as assignee of Christian F. Koeppen, to recover of the defendant, as the administrator of the estate of Christian F. H. Koeppen, deceased, the sum of eight thousand dollars. The plaintiff recovered judgment for the sum of three thousand seven hundred dollars, and from this judgment and order denying a new trial the defendant appealed to this court. Christian F. Koeppen, the assignor of plaintiff, was the father of Christian F. H. Koeppen, deceased, and claims to have intrusted to his son, in his lifetime, the sum of eight thousand dollars, to be invested by him in the name of him, the said Christian F. Koeppen, during the years 1891 to 1895, inclusive. In March, 1898, soon after **600** the death of his said son, the said Christian F. Koeppen duly made out his claim and account for said moneys so claimed to have been intrusted to the care of his son, and on the same

day, by an instrument in writing, assigned said claim and account to the plaintiff in this action, who thereupon brought this action to recover the amount so claimed to be due. The father, Christian F. Koeppen, took no written evidence from his son of the moneys so claimed to have been intrusted to him, except as to the sum of one thousand dollars, which was allowed by the administrator, and is not the subject of controversy in this action. On the trial, Christian F. Koeppen, plaintiff's assignor, was called as a witness on behalf of the plaintiff. His evidence as to the delivery of certain sums of money to his son was objected to, on the ground, among others, "that the witness is not competent to testify as to any transaction had or any conversation with the intestate or statement by the intestate; and for the further reason that it appears from the testimony that the witness is a party in interest in this suit, and that it is prosecuted in his behalf, and that the same rules of testimony apply as if he were a party to the suit; and for the further reason that the witness, by assigning his claim to the plaintiff, cannot make himself competent to testify, for the reason that he would be incompetent to testify if he had brought this suit himself." It is quite clear that, had Christian F. Koeppen been the plaintiff in this action, his testimony would have been inadmissible, under the provisions of section 5260 of the Compiled Laws. And the important question is presented as to whether or not, having assigned his claim to Witte, the party plaintiff, he is competent to testify as to transactions between himself and deceased in this action. The Compiled Laws, section 5260, provides: "That no person ⁶⁰¹ offered as a witness in an action . . . shall be excluded . . . except as hereinafter provided." The second exception found in subdivision 2 of the section is the one applicable to this case, and reads as follows: "In civil actions or proceedings by or against executors, administrators, heirs at law, or next of kin, in which judgment may be rendered or order entered for or against them, neither party shall be allowed to testify against the other as to any transaction whatever with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party." It will be observed that by the first clause of the section no person offered as a witness shall be excluded, except as therein provided, and that by the exception it is only the parties who are excluded from testifying in the action; that is, "neither party shall be allowed to testify against the other." While it is conceded by appellant that the witness was not technically a

party, he insists that he is beneficially interested, and comes within the spirit of the statute excluding a party from being a witness. This court held in *Bunker v. Taylor*, 10 S. Dak. 526, following the decision of the supreme court of the United States in *Potter v. National Bank*, 102 U. S. 163, that the witnesses excluded by the proviso are those only who are technically parties to the issues to be tried, and do not include those who are not parties, though they have an interest in the result of the issue. It seems to be well settled that when the enacting clause is general in its language and objects, and a proviso is afterward introduced, such proviso should be construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms; and those who set up such exception must establish it as being within the words, as well as within the reason thereof: ⁶⁰² *United States v. Dickson*, 15 Pet. 141; *McRae v. Holcomb*, 46 Ark. 306; *Snyder v. Fiedler*, 139 U. S. 478. Substantially the same rule is laid down in *Lobdell v. Lobdell*, 36 N. Y. 327. In that case the court of appeals of New York said: "Although it may be said that a party standing in the relation in which he does ought to have been excluded, for he has the same advantage over the plaintiff, as a witness, as his father would have had if living and standing as defendant, still, unless the section can be construed so as to exclude him, the legislature, and not the court, must rectify the omission. It will not suffice to say that the case is within the spirit of the enactment, unless a fair construction of the enactment will bring it within the enactment itself. The subject of the enactment is allowance of the parties to be witnesses in their behalf, and the object is to provide generally for their examination as witnesses, and, the specific exception to such examination the legislature having undertaken to provide, the courts cannot allow any that are not specified by the legislature": *Crimmins v. Crimmins*, 43 N. J. Eq. 86; *Voss v. King*, 33 W. Va. 236; *St. John v. Lofland* 5 N. Dak. 140. And, so far as our researches have extended, we find that, in states having a statute similar to our own, the exception has been limited to parties to the record: *Berry v. Sawyer*, 19 Fed. Rep. 286; *Stanley v. Wilkerson*, 63 Ark. 556. See, also, cases heretofore cited. This court is not at liberty to disregard the plain and express terms of the statute upon any theory as to its spirit, or what it ought or that the legislature might have intended it to be, when the statute is plain and unambiguous, as courts are not permitted to search for its meaning beyond the statute itself: *Cooley's Constitu-*

tional Limitations, 5457. The able argument of counsel ⁶⁰³ for the appellant, in which they contend that, as Christian F. Koeppen was interested in the result of this suit, as they claim, he should have been excluded as a witness, would be more properly addressed to the legislature than to this court. We are clearly of the opinion, therefore, that the learned circuit court correctly overruled the defendant's objection to the testimony offered.

It is further contended on the part of appellant that the evidence offered by plaintiff was insufficient to justify the verdict. We are of the opinion, however, after a careful review of the evidence, that it is sufficient to justify the verdict of the jury. In *Jeansch v. Lewis*, 1 S. Dak. 609, this court held that "where, in a case tried before a jury, the evidence is conflicting, this court will not weigh the evidence, or go further than to determine therefrom whether or not the party has given sufficient legal evidence to sustain his verdict, without regard to the evidence given on the part of the other party, except so far as such evidence tends to sustain his case." The case under consideration comes within the rule laid down.

The judgment of the court below and order denying a new trial are affirmed.

WITNESSES—COMPETENCY—ACTION AGAINST AN ADMINISTRATOR.—A PERSON INTERESTED, though not a party to a suit against an administrator, is a competent witness for either party: Note to *Percey v. Powers*, 14 Am. St. Rep. 698.

STATUTES MUST BE CONSTRUED according to their plain and obvious meaning: *Lippitt v. Huston*, 8 R. I. 415, 94 Am. Dec. 115.

APPEAL—SUPPORT OF FINDING OF FACT—CONFLICTING EVIDENCE.—If there is any legal and competent evidence to support a finding of fact, it is a general rule that the judgment will not be disturbed, though the evidence is conflicting: Note to *Pittsburgh etc. Ry. Co. v. Montgomery*, 71 Am. St. Rep. 322.

BLACK HILLS TELEGRAPH AND TELEPHONE COMPANY
v. MITCHELL.

[11 SOUTH DAKOTA, 615.]

GARNISHEE—EXEMPTION, RIGHT TO CLAIM AFTER DEFAULT.—Under a statute which provides that, if a garnishee “fails to appear and answer, the plaintiff may proceed against him in an action in his own name,” the only effect of the garnishee’s default is to lay the foundation for an action wherein his rights must be determined. His failure to answer the garnishment summons does not preclude him from setting up the principal defendant’s right of exemption to money garnished, and, if he paid it to the defendant after garnishment, he may justify such payment on the ground that the defendant claimed the money to be exempt, where such claim was, in fact, timely made.

Action by the plaintiff company against Mitchell & Thompson, garnishees. The plaintiff obtained a judgment, from which the defendants appealed.

John R. Wilson, for the appellants.

Rice & Polley, for the respondent.

⁶¹⁶ HANEY, J. George Laurance was indebted to the plaintiff in the sum of fifty-five dollars. Mitchell & Thompson owed Laurance sixty dollars. July 23, 1896, plaintiff began an action in justice’s court against Laurance by personal service of summons, wherein his name was written “Lawrenson,” to recover the indebtedness above mentioned. On July 25th a summons in garnishment in the same action was personally served upon Mitchell & Thompson, wherein the principal defendant was named as “George Lawrenson.” On July 27th Laurance served upon the sheriff, the officer who served the summons in the principal action and the summons in garnishment, a claim for exemptions in the manner provided by law, and demanded that all property of every kind levied upon or attached by the sheriff, and particularly all moneys garnished in the hands of Mitchell & Thompson belonging to him be released as exempt. At the time of such demand Laurance was entitled to claim such money as exempt. ⁶¹⁷ After the summons in garnishment and the demand for exemption were served Laurance demanded of Mitchell & Thompson the amount due him from them, and, after consulting counsel, and having been advised that plaintiff had no right to the money in their hands belonging to Laurance, Mitchell & Thompson paid the same to

Laurance. On July 28th Laurance appeared in the main action and moved to dismiss, on the ground that his true name was George Laurance, and not George Lawrenson. The justice denied the motion, and permitted the record to be amended by changing the name of Lawrenson to that of Laurance. Thereupon the defendant agreed that plaintiff might have judgment for seventy-nine dollars and twenty cents, and it was rendered accordingly. Mitchell & Thompson made default in answering the summons in garnishment. They admit that they knew Laurance, to whom they were indebted when they were served with the garnishment process, was personally served in the principal action, and that he was the person intended to be served in such action. Subsequently, this action was commenced to recover of the garnishees the amount due from them to Laurance when they were garnished. Plaintiff was given judgment for sixty dollars and costs, from which defendants appealed.

The attachment of the defendant's credit or property in the possession of other persons is the object intended and effect produced by all garnishment proceedings. Such attachment must necessarily be subject to the laws relating to exemptions. The act providing for garnishments in justices' courts expressly declares that nothing contained therein shall be construed to affect exemptions allowed by law, but is silent as to the manner of securing the benefits of such exemptions: Laws 1893, c. 96. ⁶¹⁸ Hence, the law relating to claims of exemptions in attachment cases is applicable to these garnishment proceedings. In all cases of attachment or levy upon personal property notice must be given to the debtor, his attorney, agent, wife, child, or person in possession; and the debtor or such other person for him must claim or demand the benefits of the exemptions within five days after such notice, with certain exceptions not material to this appeal: Laws 1893, c. 19. The claim of Laurance was made in the manner and within the time prescribed by law, and certainly operated to exempt the indebtedness due him from the garnishees. His right to such indebtedness cannot be doubted, the only question involving any difficulty being whether the garnishees, having failed to answer the summons in garnishment, can in this action justify their payment of the money to the defendant, after having been garnished, on the ground that he had properly claimed it as exempt. It is generally held to be the duty of a garnishee to set up the defendant's right of exemption if the defense is known to him: 9 Ency. of Pl. & Pr. 834. Are the defendants precluded from doing so in this ac-

tion because of their failure to answer the garnishment summons? We think not. The statute contains the following: "If the garnishee fails to appear and answer, or if he fails to comply with the orders of the justice to deliver the property and pay the money owing to the court, or give an undertaking to the plaintiff with one or more sufficient sureties, to the effect that the amount shall be paid or the property forthcoming as the court may direct, the plaintiff may proceed against him in an action in his own name, as in other cases; and thereupon such proceedings may be had as in other actions, and judgment may be rendered in favor of the ⁶¹⁹ plaintiff for the amount of the property and credits of every kind of the defendant in possession of the garnishee and for what shall appear to be owing by him to the defendant, and for the costs of the proceedings against the garnishee. If the plaintiff proceed against the garnishee by action for the cause that his disclosure was unsatisfactory, unless it appear in the action that such disclosure was incomplete, the plaintiff shall pay the costs of such action. The judgment in this action may be enforced as judgments in other cases. When the claims of the plaintiff are satisfied by the garnishee, he may on motion be substituted as the plaintiff in the judgment": Laws 1893, c. 96. So far as applicable to the case at bar, the statute provides that, "if the garnishee fails to appear and answer, the plaintiff may proceed against him in an action in his own name as in other cases." The only effect of the garnishee's default is to lay the foundation for an action, wherein his rights must be determined. The statute does not authorize the entry of any judgment upon his failure to appear and answer in the original action. Under substantially the same statute the supreme court of Kansas held that "an order of a justice of the peace directing a garnishee to deliver property or pay money to the judgment creditor which the garnishee may have in his possession, belonging or owing to the judgment debtor, is not a final determination between the parties; and in an action subsequently brought against the garnishee by the judgment creditor to enforce such order a garnishee may answer, and show whether he had money or property in his possession belonging to the judgment debtor or was indebted to him, and if so, what the character of such property or indebtedness was, or any other fact affecting the question of his liability as garnishee; ⁶²⁰ and that a garnishee may interpose the defense and show that the property or money of the judgment debtor in his hands, or his indebtedness to such

debtor, is exempt by law, and cannot be subjected by garnishment to the payment of the judgment in favor of the judgment creditor": *Mull v. Jones*, 33 Kan. 112. If an appearance by the garnishee, a trial of the truth of his answer, and an order requiring him to pay into court the amount found to be due from him to the defendant does not preclude the garnishee from showing, in an action brought to recover that amount, that the indebtedness is exempt, certainly, his mere failure to appear and answer in the original action should not have that effect. We think the defendants were entitled to show in this action that the amount due from them to Laurance became exempt by his timely demand upon the sheriff, and, having done so, the circuit court should have rendered judgment in their favor for costs.

The judgment of the circuit court is reversed and the case remanded, with directions to enter judgment dismissing the action upon its merits, and in favor of defendants for costs.

EXEMPTION—TRUSTEE MAY CLAIM FOR PRINCIPAL DEBTOR.—It is a good defense for a trustee in trustee process that goods levied on are exempt from execution; it is not necessary for the principal debtor to set up this defense in his own name: *Clark v. Averill*. 31 Vt. 512, 76 Am. Dec. 131.

AM. ST. REP., VOL. LXXIV.—53

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

MIELKE v. CHICAGO & NORTHWESTERN RY. Co.

[103 WISCONSIN, 1.]

MASTER AND SERVANT—RISKS ASSUMED.—A WORKMAN IN A STONE QUARRY cannot recover for injuries sustained from rock falling upon him from above caused by clay seams in the upper rock, running through it in all directions, causing it to separate, and the existence of which he knew as well as the foreman or superintendent of the quarry.

MASTER AND SERVANT—ASSUMPTION OF RISKS—FELLOW-SERVANTS.—A workman in a stone quarry which, by reason of blasting and removal of stone by himself and his fellow-workmen, constantly changes in its conditions and surroundings, assumes the risk of the place becoming unsafe, and cannot recover for an injury caused by the falling of a mass of stone loosened by a blast.

Action to recover damages for injury sustained by the plaintiff from falling rock while working in defendant's stone quarry. Motion for a nonsuit was granted and plaintiff appealed.

H. Grotophorst, R. M. La Follette, and R. B. Smith, for the appellant.

Fish, Cary, Upham & Black, for the respondent.

* **BARDEEN, J.** If we understand the appellant's contention, it is that defendant is liable for his injuries because it failed to furnish him with a safe place to work. The proposition that it is the duty of the master to furnish the servant a reasonably safe place in which to perform his labors has been laid down so many times by this court that it is unnecessary to cite de-

cisions to support it. There are, however, certain correlative obligations of the servant which limit the doctrine stated. The servant is bound to know, and is said to have assumed, all such dangers of the employment as were open and obvious, and such as he could have discovered by reasonable attention: *Osborne v. Lehigh Valley C. Co.*, 97 Wis. 27. In that case it was said: "Such risks he fails to appreciate at his own peril. As against him, the defendant had the right to carry on its business in such place and manner and with such appliances as best suited its choice or interests, even if some other would have been safer, so that it did not violate the law of the land nor expose him to dangers which he did not know and could ⁴ not learn by the exercise of reasonable attention." Another rule is that the servant takes upon himself the natural and ordinary risks and perils incident to the performance of his labors, whether arising from the carelessness of fellow-servants in the same line of employment or from the manner in which the work is carried on. The qualification to this rule is that the danger contemplated in entering into the contract shall not be aggravated by any omission on the part of the master to keep the surroundings in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect they would be kept: *Bailey on Personal Injuries*, sec. 458. Hidden perils, known to the master and not discoverable by the servant by the use of ordinary care, must be revealed, or the master is liable. That the stone quarry was not a safe place to work was obvious to any person of ordinary comprehension. That the plaintiff appreciated that fact is evident from his testimony, in which he says: "I looked to see whether it was all safe. I looked carefully enough to see whether there had been any stone displaced. I looked in that way, because I always did when I went any place to work, to see whether it was safe. There might be danger of rock falling down."

Counsel for plaintiff says, in his statement of the evidence, that it was the invariable custom in the quarry, whenever a blast had been exploded, to make a careful inspection, to ascertain whether any fragments of rocks loosened by the blast were likely to fall, before sending men to work on the ledge. This was done by tapping with an iron bar. It was admitted that it was impossible to discover the impending danger from the ledge by mere visual inspection. The rock that fell was seven or eight feet above the ledge. Under the invariable custom stated, it must be assumed that the proper inspection

had been made at the time the ledge was worked ⁵ down by this dangerous rock. There is no suggestion that the rock looked dangerous from the ledge, and, from the fact that it was so far above the heads of the workmen, it is not easy to perceive just how the danger could have been discovered had the usual inspection been made. But there is no evidence that such inspection was not made. We are then left to judge from the appearances on the face of the cliff. The evidence is undisputed that there were thin clay seams, from a quarter to the thirty-second of an inch in thickness, running in all directions on the face of the cliff, which were as evident to the workmen as they were to the foreman in charge. It does not appear that any particular danger was to be apprehended therefrom, or that the foreman had any knowledge of the conditions not possessed by the workmen, or that he could have secured such knowledge. The existence of the clay seam was as obvious to plaintiff as to anyone, and, in absence of evidence that the foreman or superintendent had knowledge of the danger, or could have secured it by the use of ordinary care superior to that of the workmen, no liability for the accident would follow. The plaintiff knew all the facts which the foreman or superintendent knew. The probability of the rock falling was as evident to one as to the other. No principle is better settled than that, under such circumstances, the risk is assumed: *Showalter v. Fairbanks etc. Co.*, 88 Wis. 376.

But there is another principle upon which a recovery in this case must be denied. The facts, as we view them, bring it substantially within the cases of *Peffer v. Cutler*, 83 Wis. 281, *Larsson v. McClure*, 95 Wis. 533, *Petaja v. Aurora I. Min. Co.*, 106 Mich. 463, 58 Am. St. Rep. 505, and *Paule v. Florence Min. Co.*, 80 Wis. 350. The plaintiff and his fellow-workmen were practically making the place in which they were to work. At each succeeding blast the conditions and surroundings were changed. The danger to which they were exposed was the direct result of their own operations. It was the result ⁶ of their common labor, including that of the foreman. The work was of a hazardous character. The plaintiff was familiar with the work. He knew that the condition was constantly changing by reason of his own acts. He appreciated the danger, because he knew that rocks were liable to fall. As stated in *Larsson v. McClure*, 95 Wis. 533: "The negligence, if any, in this view of the case, would be that of the plaintiff and his fellow-servants, and the risk of it must be regarded as assumed.

by the plaintiff as incident to his employment; and, in any view that may be taken of the case, it must be regarded as a risk assumed by the plaintiff as an incident to his employment."

By the Court. The judgment of the circuit court is affirmed.

MASTER AND SERVANT—ASSUMPTION OF RISKS.—If a man chooses to accept employment and to continue in it with knowledge of its dangers, he assumes the attendant risks: *Baltimore etc. R. R. Co. v. State*, 75 Md. 152, 32 Am. St. Rep. 372. Danger from a bank of earth falling is one open to common observation, and a servant engaged in excavating a ditch who, knowing that he is exposed to such danger, continues to work, assumes the risks and is not entitled to recover for injuries sustained: *Brown v. Electric Ry. Co.*, 101 Tenn. 252, 70 Am. St. Rep. 666.

MASTER AND SERVANT—FELLOW-SERVANTS.—A servant assumes all open and palpable risk of accident in the common course of the business, including the negligence of all fellow-servants, of whatever grade or rank, in the same employment: *Ell v. Northern Pac. R. R. Co.*, 1 N. Dak. 336, 26 Am. St. Rep. 621; *Norfolk etc. R. R. Co. v. Houchins*, 95 Va. 398, 64 Am. St. Rep. 791.

MOYER v. KOONTZ.

[103 WISCONSIN, 22.]

MARRIAGE AND DIVORCE—RIGHT OF WIDOW TO ANNUL DIVORCE.—An action by a wife brought after the death of her husband to annul a divorce procured by him by fraud does not affect the status of his wife under a marriage contracted after the granting of such divorce.

JURISDICTION—NONRESIDENTS—SUBSTITUTED SERVICE.—State courts cannot acquire jurisdiction over nonresidents by substituted process for mere purposes of personal adjudication against them, but only to adjudicate with reference to property within the state, or with reference to the status of one of her own citizens.

JURISDICTION—SERVICE UPON NONRESIDENTS.—Substituted service of process without the state upon the children and administrator of a deceased person is not sufficient to confer jurisdiction upon a state court to set aside a decree of divorce obtained by such deceased in his lifetime.

Action to annul a decree of divorce on the ground of fraud. This action was brought by Moyer, as guardian of Fannie Koontz, who, prior to 1864, was the wife of C. Koontz, both residing in Wisconsin. Since 1860 she had been wholly insane so as to have no knowledge of any transaction whatever. In 1864 her husband obtained a divorce from her by fraud, and in August, 1865, he married one of the defendants, Lurilla Hall,

and lived with her until he died in 1896, while living in Colorado, leaving two children by her, the defendants, Nellie and Minnie. He left real and personal property both in Colorado and in Nebraska. Minnie Koontz was appointed his administratrix in Colorado, and E. H. Strayor was appointed his administrator in Nebraska. Lurilla, Nellie, and Minnie Koontz, and E. H. Strayor were served, under an order of publication, with the summons and complaint in this action. They appeared in the action personally and moved the court that the order of publication and service of process on them be vacated and the action dismissed as to them for want of jurisdiction. The motion was granted and the plaintiff appealed.

Reed & Reed, for the appellant.

J. S. Anderson, for the respondents.

²³ DODGE, J. The statute of Wisconsin (Stats. 1898, sec. 2639) authorizes service by publication upon a defendant against whom a cause of action appears to exist when the cause of action arose in this state, and the court has jurisdiction of the subject of the action, whether founded on contract or tort. ²⁴ Clearly, the cause of action arose within this state, and, so far as our statute is concerned, the question of the right to acquire jurisdiction by publication depends on whether a cause of action appears to exist against these defendants.

It was decided by this court in *Johnson v. Coleman*, 23 Wis. 453, 99 Am. Dec. 193, that in equity a cause of action exists by a widow to vacate and annul a decree of divorce obtained by fraud, and that such action can be maintained after the death of the husband against both his heirs and the administrators of his estate, provided, of course, there be property so that there are pecuniary interests to be affected; and this, too, in an action simply to annul the decree, without being addressed toward any specific property or rights therein. The doctrine of this case has support from many authorities, although it also has much antagonism in others. Assuming its correctness, it would appear that a cause of action does exist in favor of the plaintiff which arose in this state, and if the same survives (a question not discussed, though inferentially assumed, in *Johnson v. Coleman*, 23 Wis. 453, 99 Am. Dec. 193), then that the children and administrators are the proper parties thereto, so that it exists against them. Substantially the only difference between

Johnson v. Coleman, 23 Wis. 453, 99 Am. Dec. 193, and this case is that the respondent defendants are nonresidents of this state. The question is whether this difference constitutes a legal distinction.

While procedure in our courts, inclusive of the method of obtaining jurisdiction by substituted service over those non-resident, is, and properly may be, regulated by our legislature, yet such power is subject to the federal limitation that courts of a state cannot so acquire jurisdiction over nonresidents for mere purposes of personal adjudication against them; indeed, not for any purpose, except to adjudicate either with reference to property within this state or with reference to the status of one of our own citizens. Our statutes on this subject of the acquirement of jurisdiction over ²⁵ nonresidents must be read in the light of the interstate limitations resting upon us by reason of the frame of government of the nation of which our state is a part. Pennoyer v. Neff, 95 U. S. 714, is perhaps the leading case on this subject, and there the rule above stated is announced and has never since been questioned.

Under the rule in Johnson v. Coleman, 23 Wis. 453, 99 Am. Dec. 193, there would seem to be no doubt that a wife might bring suit in our courts to annul a decree of divorce there entered, and confer jurisdiction by substituted service, in accordance with our statutes therefor; but it would be for the reason that the purpose of the suit was to adjudicate and act upon her status in relation to her absent husband, just the same as if she were suing for a divorce. Marital status is well described by Mr. Bishop in sections 698 to 702 of volume 1, and section 153 of volume 2 of Marriage, Divorce, and Separation, and St. Sure v. Lindsfelt, 82 Wis. 346, 33 Am. St. Rep. 50, and State v. Duket, 90 Wis. 272, 48 Am. St. Rep. 928. The question to be decided is simple: Shall this person, citizen of this state, be adjudged to be married or single? The status of marriage is dual. It cannot exist in the case of the one party without existing equally as to the other, and therefore, incidentally, the status of the nonresident party is to be adjudged as well. The object of such a suit as this, when the husband is alive, is to adjudicate that whereas by the existing fraudulent decree the plaintiff is made single, she shall, by the demanded judgment, be adjudicated to still be married. It is the converse of the divorce suit, where the relief sought is that whereas the plaintiff is now married, she may be adjudged to be single. But in a case like this, where, by the irrevocable act of death, her status as to

her deceased husband has become fixed as that of a celibate, no such question can exist to be acted on. No decree that the courts of Wisconsin can render can change that status. It then becomes a mere adjudication as to a record, for the purpose of satisfying a sentiment or affecting property rights. As is well said in ²⁶ 2 Nelson on Divorce and Separation, section 1054: "The proceeding will be a mere contest for property; for if the decree is vacated the survivor cannot be restored to marital rights [or status]."

It seems clear, therefore, that we have no question of status to act on here, so as to justify or empower our courts to reach their hands beyond the limits of the state, and seek, upon substituted service, to subject nonresidents to a decree, ostensibly to cure a record, the only purpose of which is to affect rights in property without this state. This would be in excess of the rights of the state. It is forbidden by the whole policy of our national government. It infringes that principle of the international law as it existed among the states in 1790, and is still maintained, that the jurisdiction of a state does not extend beyond its boundaries, and, if carried into effect, would violate the fourteenth amendment of the constitution, which prohibits Wisconsin and all other states from enacting any law which shall deprive any person of life, liberty, or property without due process of law.

Our statutes for service upon nonresidents are subject to the limitation that the cause of action therein required to exist must be one which affects property within this state or which affects the status of a resident. Such cause of action is not presented by the complaint in this case, and no jurisdiction to adjudicate thereon can be obtained against the respondents.

By the Court. The order appealed from is affirmed.

DECREE OF DIVORCE—ANNULMENT OF.—If a husband obtains a divorce by fraud, the wife is entitled to have the decree set aside: *Colby v. Colby*, 59 Minn. 432, 50 Am. St. Rep. 420; and this right is not affected by his death or subsequent marriage: See note to *Carr v. Carr*, 36 Am. St. Rep. 617; *Simpkins v. Simpkins*, 14 Mont. 386, 43 Am. St. Rep. 641, and note. In a suit by a widow to vacate a decree of divorce, both the administrator and the heirs are proper parties: *Johnson v. Coleman*, 23 Wis. 452, 99 Am. Dec. 193. As to the status of the parties and their property rights after the annulment, see the extended note to *Greene v. Greene*, 61 Am. Dec. 464, 467, and *Comstock v. Adams*, 23 Kan. 513, 33 Am. Rep. 191.

JURISDICTION.—A PERSON NOT DOMICILED in a state or country cannot be charged in personam by an adjudication there, unless he is personally served with notice or process within it, or voluntarily submits himself to the jurisdiction of its courts: *De Meli v. De Meli*, 120 N. Y. 485, 17 Am. St. Rep. 652; extended note to *De La Montanya v. De La Montanya*, 53 Am. St. Rep. 181.

SLACK v. NORTHWESTERN NATIONAL BANK.

[103 WISCONSIN, 57.]

CORPORATIONS—PREFERENCES BY INSOLVENT.—The right of creditors to proceed by ordinary process of law against an insolvent corporation to collect their demands exists as fully as though the debtor were an individual instead of a corporation.

CORPORATIONS—INSOLVENCY—RIGHT TO PREFER CREDITOR.—An insolvent corporation, while a going concern, may make a valid transfer of its property or collaterals to its creditor in payment of his debt, provided there is no actual fraud in the transaction.

CORPORATIONS—INSOLVENCY—RIGHT OF OFFICERS TO PREFER THEMSELVES.—If a corporation is insolvent and has ceased to be a going concern, and its officers know, or ought to know, that suspension is impending, they are then so far trustees that they cannot transfer the corporate property to themselves in payment of debts due them. Such a transfer attempted constitutes a fraud in law.

CORPORATIONS—INSOLVENCY—RIGHT OF DIRECTORS TO PREFER THEMSELVES.—A bank whose officers are also the de facto managers of another bank, known by them to be on the verge of insolvency and about to go into the hands of a receiver, cannot retain, as against such receiver, assets of the insolvent bank taken from it as collateral security for the payment of its indebtedness to the other bank.

CORPORATIONS—INSOLVENCY — PREFERENCES—OFFSET.—A bank having on hand funds of an insolvent bank, about to go into the hands of a receiver, may apply such funds on an indebtedness due from the insolvent bank, although its own officers are de facto the officers of the insolvent bank.

Action by the receiver of the State Trust and Savings Bank, an insolvent corporation, against the defendant, a national banking corporation, to recover an amount in notes, bonds, and other securities, as well as a large sum of money, on the ground that such assets were fraudulently taken by the officers of the defendant bank at a time when the other bank was insolvent. This transfer of assets was made February 12, 1897, and plaintiff was appointed receiver of the insolvent savings bank the next day. Judgment for plaintiff. Defendant appealed.

Ross, Dwyer & Hanitch, for the appellant.

Titus & McIntosh, for the respondent.

⁶² WINSLOW, J. We regard the findings of fact as amply supported by the evidence, and shall therefore simply discuss the legal questions arising upon the facts found. The court has had occasion in several recent cases to discuss the question of the rights of creditors to proceed by ordinary processes

of law against an insolvent corporation to collect their demands, and it may now be said to be well settled that such right exists as fully as though the debtor were an ⁶³ individual instead of a corporation: *Ballin v. Merchants' Exch. Bank*, 89 Wis. 278, 46 Am. St. Rep. 834; *Ford v. Hill*, 92 Wis. 188, 53 Am. St. Rep. 902; *Hinz v. Van Dusen*, 95 Wis. 503. Thus far, at least, the so-called "trust-fund doctrine" has been distinctly repudiated in this state; but the question whether the creditor could obtain payment of his debt from an insolvent corporation by voluntary transfer to him of property of the corporation without fraud has not been definitely decided. It is true it was said by the late Mr. Justice Newman, in *Gilman v. Gross*, 97 Wis. 224: "It certainly is not going much further to hold that, so long as the corporation is a going concern, it may in good faith use the corporate property to pay or secure its bona fide debts"; but the question did not arise in that case, and hence the remark cannot be considered as authoritative. Certainly, however, it would seem strange if a creditor could not obtain by fair voluntary agreement and transfer that which he could obtain by an adversary proceeding at law. No good reason occurs to us now upon which such an arbitrary distinction can logically rest, and we think the distinction is also in opposition to the clear weight of the later authorities upon the subject.

It was said by the supreme court of the United States, in *Fogg v. Blair*, 133 U. S. 534: "That doctrine [the trust fund doctrine] only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence." And in *Holins v. Brierfield etc. Co.*, 150 U. S. 371, it was further said: "A party may deal with a corporation in respect to its property in the same manner as ⁶⁴ with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to account for fraud, or sometimes even mere mismanagement, in respect thereto; but as between itself and its creditors, the corporation is simply a

debtor, and does not hold its property in trust or subject to a lien in their favor in any other sense than does an individual debtor." To the same effect are *Hospes v. Northwestern Mfg. Co.*, 48 Minn. 174, 31 Am. St. Rep. 637; *White etc. Mfg. Co. v. Henry B. Pettes I. Co.*, 30 Fed. Rep. 864; 2 Morawetz on Private Corporations, sec. 786; *Pondville Co. v. Clark*, 25 Conn. 97. We fully agree with the principles thus laid down, and, were the relations of the two banks in the present case simply those of debtor and creditor, we should have no difficulty in holding that the transfer of collaterals made on the evening of February 12th was a valid transfer; there being no actual fraud found.

But in this case another fact presents itself, which must be considered in view of a well-settled legal principle now to be stated. It has been held by this court in a number of cases that when a corporation is insolvent and has ceased to be a going concern, and its officers know, or ought to know, that suspension is impending, then such officers are so far trustees that they may not transfer corporate property to themselves in payment of debts due them, and that such a transfer constitutes a fraud in law: *Hinz v. Van Dusen*, 95 Wis. 503. In the present case it appears that there was no president of the savings bank, and that the directors were merely such in name, and that the savings bank was a mere offshoot of the defendant bank; and, while having nominally a separate corporate existence, its affairs were exclusively managed by the officers of the defendant bank. The cashier of the savings bank was in fact but a subordinate of the defendant bank, and simply did the bidding of its officers. The defendant bank, therefore, was in the same position in fact as the legally elected directors of the savings bank would have been had they performed their duties. To say that legally elected officers cannot prefer themselves, but that persons who are in fact acting as officers and managing the business can prefer themselves, would seem an anomaly in the law. Such a holding sacrifices substance to form, and would open an easy way by which the assets of an insolvent corporation could be divided up among persons who were officers *de facto*, but not *de jure*. The law is guilty of no such absurdity. In this case the defendant, through its officers, was in fact managing the affairs of the savings bank. It could no more prefer itself out of the assets of the savings bank when it was insolvent and was on the verge of suspension, than could legally elected directors, and for the same reasons. This seems

to us good sense and good law, and it does not infringe upon the doctrine that a mere creditor of an insolvent corporation may by voluntary transfer, in good faith, receive and hold property of the corporation in payment of his debt or as collateral thereto.

This conclusion renders necessary an affirmance of the judgment so far as the collaterals and the eight hundred dollars in money are concerned, which were transferred to the defendant on the evening of February 12, 1897. We can see no reason, however, for holding that the remainder of the deposits, amounting to three thousand nine hundred and forty-four dollars and twenty-nine cents, should be recovered by the receiver. These deposits had been made apparently in the regular course of business at previous times, and simply constituted an indebtedness which the defendant bank owed to the savings bank, and which it had the right to offset against a part of the much larger indebtedness owing to it by the savings bank: *Johnston v. Humphrey*, 91 Wis. 76, 51 Am. St. Rep. 873. The ⁶⁶ fact that a check was given by Landswick on the evening of February 12th would not destroy this right.

By the Court. That part of the judgment providing for a recovery of three thousand nine hundred and forty-four dollars and twenty-nine cents and interest is reversed, and in all other respects the judgment is affirmed. No costs are allowed either party, but the respondent will pay the fees of the clerk of this court.

Bardeen, J., took no part.

CORPORATIONS—RIGHTS OF CREDITORS.—A creditor, knowing a corporation to be insolvent, may attach its property and thereby obtain a preference over other creditors: *Ballin v. Merchants' Exchange Bank*, 89 Wis. 278, 46 Am. St. Rep. 834.

INSOLVENT CORPORATIONS—PREFERENCES BY.—Though a corporation has become insolvent, if it continues to be a going concern and to conduct its business in the ordinary way, its assets are not trust funds for equal distribution among its creditors, so that it has not power to make preferences or preferential payments to some of such creditors: *Tradesman Pub. Co. v. Knoxville C. W. Co.*, 95 Tenn. 634, 49 Am. St. Rep. 943; *First Nat. Bank v. Dovetail etc. Co.*, 143 Ind. 550, 52 Am. St. Rep. 435; monographic note to *Conover v. Hull*, 45 Am. St. Rep. 828. Compare *Conover v. Hull*, 10 Wash. 673, 45 Am. St. Rep. 810.

CORPORATIONS—OFFICERS AS PREFERRED CREDITORS. The property of an insolvent corporation is a trust fund in such a sense as to preclude its directors and officers dealing with it so as to secure preferences to themselves: See monographic note to *Buck v. Ross*, 57 Am. St. Rep. 78; *Adams & Westlake Co. v. Deyette*,

8 S. Dak. 119, 59 Am. St. Rep. 751; extended note to Conover v. Hull, 45 Am. St. Rep. 835. Compare Schufeldt v. Smith, 131 Mo. 280, 52 Am. St. Rep. 628, and note. See, too, Campbell etc. Mfg. Co. v. Marder, 50 Neb. 283, 61 Am. St. Rep. 573. But if security is given to a director when the corporation is solvent, its subsequent insolvency cannot operate retroactively to defeat the security or preclude him from making it effective; Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 25 Am. St. Rep. 401.

ZINC CARBONATE CO. v. FIRST NATIONAL BANK.

[103 WISCONSIN, 125.]

CORPORATIONS—ULTRA VIRES AS DEFENSE.—A corporation cannot violate its charter for pecuniary gain and retain the benefit of its illegal conduct by asserting ultra vires as a defense.

CORPORATIONS—ULTRA VIRES—WHO MAY SET UP.—If a corporation transcends its powers, ordinarily it is for the state alone to call it to account.

CORPORATIONS — CONSPIRACY — LIABILITY — COMPLAINT.—A corporation may be held liable as a party to a conspiracy to defraud, and in an action against it charging it with having conspired with codefendants to defraud in a transaction outside the scope of its charter, the complaint is not defective for want of averments that the corporate officers and agents were specially authorized to act as they did in behalf of the corporation.

JUDGMENTS.—RELIEF FROM THE INEQUITABLE USE of a judgment must be sought by motion in the action wherein the judgment was rendered, when the time limited by statute for opening the judgment has not expired, or the court had no jurisdiction to enter it, or the time limited by statute for opening the judgment has expired, and its inequitable use only is complained of.

JUDGMENTS—RELIEF FROM FRAUD AND MISTAKE.—A judgment, free from jurisdictional defects, cannot be relieved against for fraud or mistake going to the judgment itself, after the term when it was rendered and the time prescribed by statute has expired, except by an independent action in equity.

FRAUD—CONSPIRACY—LIABILITY.—Persons who, in pursuance of a conspiracy to defraud, create a corporation of which they gain control, and, while acting ostensibly in its interests, carry out the fraudulent scheme, and absorb its assets for their own private benefit, are all equally liable to make good the loss, without reference to the proportion of the fruits of the fraud, which each receives.

ACTIONS—PLEADING.—The test of whether there is more than one cause of action stated, or attempted to be stated, in a complaint is not whether there are different kinds of relief or objects sought, but whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication.

Van Dyke, Van Dyke & Carter and Spensley & McIlhon, for the appellant.

Orton & Osborn and J. B. Simpson, for the respondent.

¹³⁰ MARSHALL, J. The complaint in this case appears to be free from novelty except for the magnitude of the fraudulent scheme set forth, its completeness, the boldness with which it was consummated, and the fact that a national bank was one of the guilty parties. But waiving for the moment the question of whether a corporation can be charged as such in the form attempted in the complaint, no reason is perceived by reading such complaint why it is open to the objections raised by the demurrer. The well-known ability of the judge who passed upon the complaint below precludes belief that he condemned it except upon some well-defined theory of insufficiency within the scope of respondent's objections. What that theory was is not disclosed by the order or in ¹³¹ the return, or discoverable by our own reading of the pleading. The appellant has favored us with the result of much research and learning upon the theory that the learned circuit court condemned the complaint because the wrongful acts charged, though sufficient to bind a natural person, are not to bind a corporation in a matter beyond the scope of its corporate powers. This and other courts have so often held that a corporation cannot violate its charter for pecuniary gain and retain the benefits of its illegal conduct by putting up the shield of *ultra vires*, or a person set himself up as the champion of the state in a court of justice to either punish or defend a corporation by an appeal to such doctrine in order to enable him or it to obtain or retain an unconscionable advantage, that we may safely reject the idea that it was thought a contrary view ruled the issue of law in the case adversely to appellant. The doctrine of *ultra vires* is a most powerful weapon to keep private corporations within their legitimate spheres and to punish them for violations of their corporate charters, and it probably is not invoked too often; but to place that power in the hands of the corporation itself or a private individual, to be used by it or him as a means of obtaining or retaining something of value which belongs to another, would turn an instrument intended to effect justice between the state and corporations into one of fraud as between the latter and innocent parties. Such is the modern doctrine, evolved and settled in the progress of events, reaching from the time when private corporations were few and the doctrine of *ultra vires* invoked quite as freely as to them as to public corporations, to a time when substantially all restrictions to the formation of

such private bodies were removed, and they were authorized and commenced to exist, great and small, everywhere, for the purpose of conducting almost every kind of legitimate business. If such a body transcend its powers it commits a wrong against the state, and ordinarily it is for the state ¹³² only to call it to account for such violation: *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 65 Am. St. Rep. 22; *Winterfield v. Cream City B. Co.*, 96 Wis. 239; *McElroy v. Minnesota etc. Co.*, 96 Wis. 317; *Hubbard v. Haley*, 96 Wis. 578; *Davis v. Old Colony Ry. Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Bensiek v. Thomas*, 66 Fed. Rep. 104; *Railway Co. v. McCarthy*, 96 U. S. 258; *Wright v. Pipe Line Co.*, 101 Pa. St. 204, 47 Am. Rep. 701; *Nashua etc. Corp. v. Boston Ry. Corp.*, 164 Mass. 223, 49 Am. St. Rep. 454.

With what has been said we may dismiss from consideration the doctrine of ultra vires as affecting this case, and it is so near akin to the idea that a corporation cannot commit or be liable for a tortious act that we will spend no time on that. Counsel for respondent freely admit that a corporation may be liable for a tortious act and as a co-conspirator in a scheme to commit fraud, but insist that unless the fraud be a wrongful means resorted to to accomplish something which the corporation has a lawful right to do by lawful means, fraud cannot be attributed to it unless its officers or agents who assumed to act in its behalf were specially authorized to so act, and that a statement of the cause of action to remedy such a wrong requires the special authorization to be pleaded. We need not, for this appeal, determine whether the special authorization is necessary. If it be admitted, for the purposes of the discussion, that such is the case, yet the complaint charges that the corporation did the wrongful acts. That is repeated over and over again. How it became involved in the transactions complained of is a matter of proof in respect to which an issue need not necessarily be tendered by the complaint. If the allegations charging the corporation are open to any criticism, it is upon the ground of indefiniteness to be reached by motion and not by demurrer. From the allegation that the corporation conspired with Savage and Hayden, it is reasonably inferable that everything was done by its governing body necessary to the authority of those who assumed to act in its behalf. Necessary facts, reasonably inferable from those ¹³³ pleaded, under our liberal rules of pleading, must be considered as pleaded by way of such inference: *Miller v. Bayer*, 94 Wis. 123. It may properly be said in addition on this point that the complaint fairly

shows ratification by the corporation of the scheme entered upon and carried out in part by its officers and agents assuming to act in its behalf with knowledge of the facts. That is sufficient to render it liable by ratification, the same as if such officers and agents were originally authorized to represent and act for it.

The foregoing covers the ground upon which the demurrer was sustained below, so far as it can be discovered from appellant's brief, but respondent calls our attention to several other supposed defects, most of which, we apprehend, did not receive attention below because not there suggested; yet as the demurrer must be sustained here, if sustainable at all, though the point which ruled the matter in the original jurisdiction be untenable—a practice quite unfair to a trial court, though too well intrenched in our system to be disturbed—all the points made by respondent's counsel have received careful attention, yet without discovering any cause for condemning the complaint on any of the grounds stated in the demurrer. The more important of respondent's suggestions will be treated in detail.

It is said the complaint alleges that Savage and Hayden, as officers of plaintiff, bought the mill property for the nominal consideration of thirteen thousand dollars, while they paid the bank therefor only three thousand dollars; that the conspiracy alleged was to sell the property, and the bank is not shown to have been connected with that. That overlooks the matters of inducement pleaded, to the effect that the bank, at the time the alleged fraudulent scheme was made, owned the worthless mill property which it had acquired in due course of business in efforts to collect a bad debt, and that it became a party to such scheme as a means to collect its money, and, incidentally, to obtain fraudulent gains, and that when the complaint comes down ¹³⁴ to the fraudulent agreement it is alleged that the sale of the mill plant was to plaintiff for ten thousand dollars more than it was worth and more than the cost to the conspirators, and that it was a part of the fraudulent agreement that Savage, the cashier of defendant, and Hayden, should obtain control of the proposed corporate organization, its books and papers, and then, while ostensibly handling its business in the interest of the corporation, consummate the prearranged plan to swindle it for the benefit of all the defendants, and to manipulate its records so as to hide the facts. It needs no extensive discussion to show that the allegations which follow, to

the effect that the scheme was consummated, are laid definitely within the original plan, to which it is very clearly alleged defendant bank was a party. The argument of counsel on this point that at most the alleged conspiracy was to sell and that the allegations as to consummation include only Savage and Hayden, by charging that they, as officers of the defendant, bought, and that the two acts are not connected, hardly bears the test of reasonable analysis. The story told is, plainly, that Savage and Hayden, acting for the conspirators, pursuant to the agreement to sell the mill plant and the mine to the appellant, in a way to fraudulently secure gains for such conspirators, of which it is plainly said over and over again the bank was one, purchased the property for the corporation so as to make such gains to the amount of ten thousand dollars.

Again, it is suggested that as to the mine the allegations regarding the bank's connection with it are subject to the same infirmity as those in regard to the mill plant, and that, as defendants obtained the option on the mine before the organization of plaintiff was thought of, they had a right without fraud to sell it in good faith at an advance. What has been said as to the alleged connection of the bank with the fraudulent sale of the mill plant applies equally as well to the sale of the mine. True, if defendants or the bank owned the mine, either one or all had a right, acting in ¹³⁵ good faith, to sell it at an advance, but the mischief of the matter was, according to the complaint, that neither the bank nor either of the defendants acted in good faith. The bank did not own the mine, neither did the defendants. Savage and Hayden occupied positions of trust and confidence as to the subscribers to the stock of the corporation in the first instance, and after its organization they occupied such positions in regard to it as directors and officers. In that situation, for Hayden and Savage to pretend that the mine was the property of third persons and could be bought only for seven thousand dollars, while they and the bank secretly controlled the right to purchase it for two thousand dollars less, and, by that means, acting for the buyers ostensibly, but secretly for the sellers, of whom the bank was one, to make the sale of the property to appellant, rendered all of the defendants liable to refund the profits they made out of the transaction and without reference to the proportion which each received of the fruits of the fraud; and an equitable action to charge them as trustees of their ill-gotten gains and to compel an accounting for and restitution of the

same was proper, though not the exclusive remedy for the wrong: *Fountain Spring P. Co. v. Roberts*, 92 Wis. 345, 53 Am. St. Rep. 917; *Franey v. Warner*, 96 Wis. 222; *Hebgen v. Koeffler*, 97 Wis. 313.

On that branch of the case which respondent treats as a separate cause of action to avoid a judgment, it is said that the neglect of Hayden, the secretary of plaintiff, to defend was neglect of the corporation, and his knowledge, its knowledge; therefore equity will not grant relief, citing *Nye v. Sochor*, 92 Wis. 40, 53 Am. St. Rep. 896. That was a case involving the question of mere neglect. If an agent merely neglect the principal's business, action or nonaction of the former constituting such neglect will be attributable to the principal. But the idea that an agent can collude with a third person to bring about such neglect for the purpose of obtaining the principal's property for the joint benefit of the agent and such third ¹³⁶ person, and then shield themselves behind the doctrine that neglect of the agent is neglect of the principal, is not worthy of serious consideration. The mere statement of it is sufficient to show its absurdity.

Further, as to the supposed separate cause of action, the point is made that under the code of this state, circuit courts have jurisdiction of what were formerly suits in equity, as well as actions at law, all distinctions between such suits and actions having been abolished, and that, under the new system, a direct action to open or vacate a judgment will not lie; that the only remedy is by petition at the foot of the judgment, and that in such a proceeding other parties may be brought in. To that point *Stein v. Benedict*, 83 Wis. 603, is cited. That was a case commenced in the circuit court to restrain the enforcement of a judgment rendered in another such court against one defendant who was really surety for another defendant who was solvent. There was no question but that the judgment was properly rendered, and that the judgment creditor was legally and equitably entitled thereto. The complaint was merely of the inequitable use of the judgment in that threats were made to collect it out of property of the surety instead of that of the principal. The court decided that the action would not lie, (1) because one circuit court will not restrain the enforcement of a judgment rendered in another circuit court; (2) because relief was obtainable by motion in the action in which the judgment was rendered. Said Justice Pinney, who wrote the opinion, in substance, "the

power of the court in which the judgment was rendered to grant the relief by petition, in cases like this, is undoubted." The authorities cited to support that statement clearly indicate that the court had in mind only situations involving the inequitable use of a valid judgment, one free from attack originally, not one claimed to be invalid because of fraud in its rendition. Among the citations is *Platto v. Deuster*, 22 Wis. 482 (460), where the wrong complained ¹³⁷ of was threatened enforcement of a judicial sale by writ of assistance against a person not bound by the judgment upon which the sale was based. *Cardinal v. Eau Claire L. Co.*, 75 Wis. 405, is another, where the wrong sought to be prevented was a second collection of a judgment, it having been once paid but not satisfied. What was said in *Stein v. Benedict*, 83 Wis. 603, and others of its class, particularly *Endter v. Lennon*, 46 Wis. 299, about applying by petition in the original cause, must not be read as authorizing such a proceeding to attack and annul a judgment on the ground of fraud or to prevent its enforcement on that ground, the fraud reaching back to and entering into the proceedings which resulted in the judgment. There were some observations made in *Stein v. Benedict*, 83 Wis. 603, about the filing of a petition and its having the nature of a cross-bill or supplemental bill, and the bringing in of new parties and there being substantially a new trial and the entry of a new or supplemental decree, referring to sections 2610 and 2883 of the Revised Statutes of 1878. What was thus said was outside the case. Such sections refer to the bringing in of parties, the formation of issues and the entry of judgment, so as to settle by a single decree the rights of all parties—not to proceedings to review a judgment already entered. The method provided by the code for opening a judgment and for further proceedings in the cause is exclusive. After the time limited by statute has expired, relief against a judgment on the ground that it ought not to have been rendered, for some cause not presented and passed upon by the court, must be obtained by an independent action in equity: *Crowns v. Forest L. Co.*, 102 Wis. 97. In such independent action the complaint may be spoken of as a bill in the nature of a bill of review, in the sense that it is the pleading on the part of a plaintiff to accomplish, in effect, the purpose of the former bill of review. Strictly speaking, bills of review and bills in the nature of bills of review, as such pleadings were known to the old chancery practice, are not ¹³⁸ known to the code. The statutory method by

motion for opening a judgment after the term at which it was rendered, in order to obtain relief from fraud or mistake, is regulated by section 2832 of the Statutes of 1898, limiting the time to one year after notice of the judgment, and section 2879, which authorizes a new trial to be granted on an application made in whole or in part upon newly discovered evidence within one year from the verdict or finding. This court said in *Whitney v. Karner*, 44 Wis. 563, overlooking section 2879, which was then new: "A circuit court has no power to set aside its own judgment after the term at which it was entered, except where the judgment is void, or to correct clerical errors, other than under the power granted by section 38, chapter 125, of the Revised Statutes of 1858," now section 2832 of the Statutes of 1898. The two sections referred to cover the only ways provided by the code for the reopening of a cause after the judgment and the term on account of matters not of record, and a retrial on the merits. But that does not militate at all against the power of the court by motion to prevent the inequitable use of a valid judgment, as instanced in case of an attempt to collect a judgment twice and the case of an attempt to collect the judgment of a surety where there was ample property in sight belonging to the principal out of which it could be readily collected. To such situations *Endter v. Lennon*, 46 Wis. 299, and *Stein v. Benedict*, 83 Wis. 603, apply. Neither does the limitation upon proceedings by motion to open a judgment upon some ground going to the right of plaintiff to the relief granted militate at all against jurisdiction in equity to protect a person from a judgment obtained against him by fraud. So, if the facts upon which it is sought to avoid the effect of the alleged fraudulent judgment in this case constitute a pretended separate cause of action, the court has jurisdiction of it and of the parties, and obviously there is no defect of parties. Whether the relief sought in regard to the judgment is the proper relief, or whether the prayer suggests relief beyond the power of ¹³⁰ the court, it is not necessary here to decide. It is sufficient on the demurrer that the facts pleaded warrant substantial equitable relief as to the alleged fraudulent judgment.

The last two points need not necessarily have been treated, because, in our view of the complaint, the pleader did not attempt to, and did not, state more than one cause of action. Such points are discussed because the subject covered is likely to have some material bearing on further proceedings in the

cause. There is but one subject of action—the conspiracy to defraud and its consummation to the damage of plaintiff. All the allegations of fact are parts of the presentation of that one subject. The test of whether there is more than one cause of action stated or attempted to be stated in a complaint is not whether there are different kinds of relief or objects sought, but whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication: *Gager v. Bank of Edgerton*, 101 Wis. 593; *Bassett v. Warner*, 23 Wis. 673. Measuring the complaint before us by that inflexible rule of equity pleading, it is easily seen that there is but one primary right which plaintiff is endeavoring to have vindicated, and that is the right to reimbursement for the damages which the corporation has suffered by the alleged consummated fraudulent scheme of defendants.

What has been said leaves nothing more that occurs to us which can be profitably discussed or need be decided. The complaint seems to be free from any of the objections urged against it by respondent and the demurrer to have been improperly sustained.

By the Court. The order appealed from is reversed, and the cause remanded for further proceedings according to law.

CORPORATIONS—DEFENSE OF ULTRA VIRES.—A corporation cannot avail itself of the defense of ultra vires when a contract has been performed in good faith by the other party and the corporation has had the full benefit of the performance: *Kadish v. Garden City etc. Assn.*, 151 Ill. 531, 42 Am. St. Rep. 256; *Bedford Belt Ry. Co. v. McDonald*, 17 Ind. App. 492, 60 Am. St. Rep. 172, and note; monographic note to *In re Assignment Mut. Ins. Co.*, 70 Am. St. Rep. 167.

CORPORATIONS.—THE QUESTION OF ULTRA VIRES, ordinarily, can be raised only in a direct proceeding by the state against the corporation: *Note to Pacific R. R. Co. v. Seeley*, 100 Am. Dec. 376; *Southern Ins. etc. Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448. See, too, *Farwell Co. v. Wolf*, 96 Wis. 10, 65 Am. St. Rep. 22; extended note to *In re Assignment Mut. Ins. Co.*, 70 Am. St. Rep. 178.

CONSPIRACY—LIABILITY OF CONSPIRATORS.—If several persons combine to carry out a fraudulent conspiracy to cheat another, each and all are liable to him without reference to the amount of the fruits of the transaction each obtains, or the degree of his activity in the scheme: *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345, 53 Am. St. Rep. 917. On the liability of promoters of corporations for fraud and conspiracy, see the case last cited, and the extended note to *Pittsburg Min. Co. v. Spooner*, 17 Am. St. Rep. 166-168.

JUDGMENTS—RELIEF FROM.—The power of a court, for fraud, mistake, inadvertence, or other statutory reasons, to relieve a party from a judgment taken against him, must be exercised

within the time provided by the statute: See extended note to Burnham v. Hays, 58 Am. Dec. 392, 393. But if the judgment is void for want of jurisdiction, it may be vacated on motion, no matter what length of time has interposed since its entry: See monographic note to Furman v. Furman, 60 Am. St. Rep. 642, 643; and a court of equity may set aside a judgment for fraud or irregularity, though the time prescribed by statute has expired: Larson v. Williams, 100 Iowa, 110, 62 Am. St. Rep. 544. See, also, Furman v. Furman, 153 N. Y. 309, 60 Am. St. Rep. 629; and the extended notes to Nicklin v. Robertson, 52 Am. St. Rep. 795-799; Morrill v. Morrill, 23 Am. St. Rep. 104-119.

FULTON v. STATE.

[103 WISCONSIN, 238.]

JUSTICE OF PEACE—JURISDICTION—APPEARANCE.—

If a justice of the peace fails to note in his docket the place to which a case is adjourned, he loses jurisdiction, and his judgment is void; but a subsequent general appearance and adjournment by "mutual consent" revives the jurisdiction.

JUSTICE OF PEACE—DOCKET ENTRIES—CONCLUSIVE-

NESS.—An entry in a justice's docket that "parties appeared" is, in the absence of any qualification, a general appearance; and, on the return of a justice of the peace to a writ of certiorari, is conclusive, and cannot be collaterally attacked by extrinsic evidence, or by the statements of the justice himself.

CERTIORARI—WHAT REVIEWED ON.—

On a common-law certiorari, the court can review proceedings of a justice of the peace only so far as they relate to jurisdictional questions shown by the pleadings and docket entries. It cannot consider questions of law arising upon such entries, or any question which involves an inquiry into the evidence. Hence, if such justice adjourns the case, or enters judgment contrary to a stipulation of the parties, it is an error of law that cannot be reached by certiorari.

JUSTICE OF PEACE—JURISDICTION—PRESUMPTION.—

Every reasonable presumption should be indulged to uphold the jurisdiction and proceedings of a justice of the peace. Hence, the failure of the justice to sign his name to the judgment entered on his docket does not render the judgment void.

JUSTICE OF PEACE—JUDGMENTS—PRESUMPTION.—

It is not absolutely necessary for the docket entry of a justice of the peace to show the time when a judgment was entered; and although no date was noted on the margin or in the body of the docket as to the time when such judgment was in fact rendered, it is nevertheless valid, if sufficient appears to show that it followed in consecutive order after the hearing of proof, and upon the same day that the case was called.

JUSTICE OF PEACE—JURISDICTION.—

The failure of a justice of the peace, in entering an adjournment on his docket, to state the year does not deprive him of jurisdiction, as the current year must be understood as having been intended.

Quarles, Spence & Quarles and G. Lines, for the appellant.

Lawrence & Keeley, for the respondents.

240 BARDEEN, J. The justice is said to have lost jurisdiction because he adjourned the cases and failed to note the place to which they were adjourned in his docket. This is undoubtedly true as to the adjournment had on November 11th, and, unless he regained jurisdiction, the judgments are void: *Crandall v. Bacon*, 20 Wis. 639, 91 Am. Dec. 451. The return of the justice shows that at the adjourn day (January 11th) the parties appeared, and the cases were adjourned by consent to a later date. This is true of each successive adjournment ²⁴¹ up to the date of rendition of judgment. The entry in the docket, "parties appeared," in absence of any qualification, is a general appearance, and waives any defect in jurisdiction prior to that time: *Cron v. Krones*, 17 Wis. 401. The return of the justice to the writs of certiorari upon this point is conclusive. The entries of the justice in his docket import verity, and they cannot be contradicted or impeached by extrinsic evidence or by statements of the justice: *Cassidy v. Millerick*, 52 Wis. 379; *Smith v. Bahr*, 62 Wis. 244; *State ex rel. Green v. Van Ells*, 69 Wis. 19; *State ex rel. Cameron v. Roberts*, 87 Wis. 292. The docket entries in each of the cases show that there was a general appearance by the defendants at the date subsequent to the time when the justice lost jurisdiction, and that each adjournment was had by "mutual consent." Such being the fact, there was no lack of jurisdiction to render judgment on the day of final adjournment.

It is said, however, that there was a stipulation that one case was to be tried and that the others were to abide the event of that suit; and it is argued that the adjournments and entry of judgment were contrary to that stipulation, and therefore illegal and void. If the justice adjourned the cases and entered judgment contrary to the stipulations, it was an error of law, and cannot be reached in this proceeding. Upon a common-law certiorari the court will only review the proceedings and judgment of the justice so far as they relate to jurisdictional questions shown by the pleadings and docket entries, and will not consider questions of law arising upon such entries, or any question which involves an inquiry into the evidence: *Callon v. Sternberg*, 38 Wis. 539, and cases cited.

There is, however, another and more serious question to be considered. In nine of the cases the return shows that

at the time the writs of certiorari were served the justice had not signed his name to the judgments in his docket. The ²⁴² judgments had been fully entered and costs taxed. It is urged that the omission of the justice to sign the docket worked a loss of jurisdiction, and rendered the judgments void. Section 3574 of the Revised Statutes of 1878 specifies the entries which a justice is required to make in his docket. Subdivision 10 says he shall enter "the judgment rendered by the justice and the time of rendering the same, and the amount of the debt, damages, costs, and fees due to each person separately." All of these requirements were complied with by the justice. Neither in section 3574 nor in any other statute of which we are aware is there any requirement that the justice shall sign any of the entries in his docket. It certainly is better practice for the justice to so authenticate his docket, but, unless there is some positive statute making such signature necessary, the failure to do so will not work a loss of jurisdiction. The general rule is that every reasonable presumption should be indulged to uphold the jurisdiction and proceedings of the justice: *Bacon v. Bassett*, 19 Wis. 45; *Baizer v. Lasch*, 28 Wis. 268; *Healy v. Kneeland*, 48 Wis. 497; *Storm v. Adams*, 56 Wis. 137; *Driscoll v. Smith*, 59 Wis. 33.

The rendition and entry of judgments are the important things. When the proper judgment has been pronounced and the proper entries made in the docket every requirement of the statute has been met. In *Storm v. Adams*, 56 Wis. 137, cited above, the point was made that a judgment of the justice under which one of the parties claimed was a nullity, because not signed. The claim is not mentioned in the opinion, and seems to have been dismissed with other objections held to be irregularities not affecting the jurisdiction of the court. In the early days of this state there was a statute in force which required the judge of the circuit court to sign the record at the end of each day's proceedings. In *Eastman v. Harteau*, 12 Wis. 267, on the trial at the circuit the clerk's unsigned record was introduced in evidence to prove the existence of a judgment against objection. ²⁴³ This court held the record sufficient, and that the requirement of the statute was directory. In *Baker v. Baker*, 51 Wis. 538, an unsigned and unrecorded order of the county court was held valid. A case more directly in point has been decided in Minnesota under a statute almost identical with ours. In *State v. Bliss*, 21 Minn. 458, the court said: "It is objected that the judgment

of the justice was not signed by him. The statute provides that the justice shall enter the judgment in his docket, but it is not provided that the entry shall be signed by him. We think the judgment, when entered, is good without signing. It is very proper for a justice to sign a judgment entered by him in order to facilitate the proof of the judgment, but it is not essential to its validity, as its authenticity may be shown by proof that the book in which it is entered is the docket of the justice." To the same effect is *Gunn v. Tackett*, 67 Ga. 725. See *Van Fleet on Collateral Attack*, sec. 690; *Freeman on Judgments*, sec. 38; *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491.

A further point is made that the docket entries do not show the time when the judgments were entered. This is hypercritical. The returns show that the cases were called on April 23d at 10 A. M., the day and hour to which the cases were adjourned; that plaintiff was present; that the court waited one hour, when the defendants appeared specially. Then follow the proceedings upon the trial in regular order, the filing of papers, the swearing of witnesses, and a statement that defendants offered no testimony, "whereupon it is adjudged," etc., the judgment being written out in full. No date was noted on the margin or in the body of the docket as to the time such judgment was in fact rendered, but sufficient appears to show that it followed in consecutive order after hearing of proof, and upon the same day the case was called. It would be going beyond the limit of strictness to say that these judgments are void, under these circumstances. It is perfectly apparent that the proceedings ²⁴⁴ were consecutive from the calling of the case to the entry of judgment. The date when the cases were called being stated, it will be presumed that judgment followed in the regular order of procedure on that date. The failure of the justice to give the year after stating the day of the month is of no importance. Earlier in the docket it appears that the year was 1898, and successive adjournments were had during several months to the date mentioned. This objection is sufficiently covered by *Stromberg v. Esterly*, 62 Wis. 632, where it is held that the failure of the justice, in entering an adjournment, to state the year would not deprive him of jurisdiction, for the current year would be understood as having been intended.

These observations are sufficient to show that the judgments

rendered by the justice were valid and binding, and that the county court was in error in entering judgments of reversal.

By the Court. The judgment of the county court in each of these cases is reversed, and they are each remanded, with directions to enter judgments therein affirming the judgment of the justice.

A JUSTICE OF THE PEACE LOSES JURISDICTION over a cause when he adjourns it one week without specifying the hour of the day or the place to which it is adjourned: Note to Wheeler v. Paterson, 58 Am. St. Rep. 530. The place, day, and hour to which a cause is adjourned by a justice of the peace must all appear from the docket entries made by him, or he loses jurisdiction: Note to Crandall v. Bacon, 91 Am. Dec. 452.

JUSTICES' JUDGMENTS—PRESUMPTION IN FAVOR OF.—Justices' courts are, within their defined limits, tribunals of general jurisdiction, and all reasonable presumptions are indulged in support of the validity of their judgments: Heck v. Martin, 75 Tex. 469, 16 Am. St. Rep. 915; and in a collateral attack on such judgments, the attacking party must assume the burden of showing that the justice did not have jurisdiction: Hambel v. Davis, 89 Tex. 256, 59 Am. St. Rep. 46; but see the cases cited in note thereto; also, Leonard v. Sparks, 117 Mo. 103, 38 Am. St. Rep. 646; Townsly-Myrick Co. v. Fuller, 58 Ark. 181, 41 Am. St. Rep. 97; Wilkerson v. Schoonmaker, 77 Tex. 615, 19 Am. St. Rep. 803.

JUSTICE'S JUDGMENT—FORM OF.—The record of a justice of the peace should not be scrutinized with severity, and the judgment of a justice's court is not expected to be in perfect form. Matters of form in such a judgment are to be overlooked: Note to Davis v. Trump, 64 Am. St. Rep. 853.

JUSTICES OF PEACE—ENTRY OF JUDGMENT.—A statute requiring the entry of judgments in the docket of a justice of the peace is directory merely: Hickey v. Hinsdale, 8 Mich. 268, 77 Am. Dec. 450, and note. Formal entry may be made at any time, and if the docket shows everything necessary to support a judgment for one of the parties, an execution may issue in his favor, though the docket fails to show any actual entry of judgment: Hall v. Tuttle, 6 Hill, 38, 40 Am. Dec. 382, and note. See, too, Davis v. Shaver, Phill. (N. C.) 18, 91 Am. Dec. 92.

JUDGMENT—ENTRY AND SIGNING.—A provision of the statute in relation to signing the entry or record of a judgment by the judge who rendered it, is directory merely, and a noncompliance therewith does not invalidate the judgment: Childs v. McChesney, 20 Iowa, 431, 89 Am. Dec. 545, and note.

CERTIORARI—WHAT REVIEWABLE ON.—Upon certiorari to an inferior court only those errors or defects going to the jurisdiction of such court will be inquired into: Extended note to Duggen v. McGruder, 12 Am. Dec. 535. See this note, pages 529-537, and the monographic note to Wulzen v. Board of Supervisors, 40 Am. St. Rep. 29-46, on the scope of certiorari in general.

PEWAUKEE v. SAVOY.

[103 WISCONSIN, 271.]

WATERS AND WATERCOURSES—LAKES AND LAND THEREUNDER—TITLE TO.—Submerged lands of navigable lakes within the boundaries of the state belong to the state in trust for public use, substantially the same as submerged land under navigable waters at common law, and the state cannot change the condition of the title to the detriment or abdication of such trust.

WATER AND WATERCOURSES—LAKES ARTIFICIALLY RAISED—TITLE TO LAND UNDER.—The title of the state to lands under the water of navigable lakes extends so as to include lands covered by an artificial raising of the level of such lakes, provided such artificial level is continued for such length of time as to confer the right by prescription to maintain it permanently.

WATER AND WATERCOURSES—LAKES ARTIFICIALLY RAISED—LEVEL OF RIGHTS OF PUBLIC IN.—If a person artificially raises the level of the waters of a navigable lake, the public rights therein are correspondingly extended so long as such artificial level is maintained.

WATERS AND WATERCOURSES—LAKES WITH ARTIFICIALLY RAISED LEVEL—TITLE IN STATE BY DEDICATION.—If a person artificially raises the level of the waters of a navigable lake, and maintains such condition for a length of time sufficient to confer title by prescription, during which time the public use and enjoy such lake, the title to his lands thereunder vests in the state by dedication, and he is estopped to revoke such dedication.

WATERS AND WATERCOURSES—STREET BOUNDED BY LAKE—RIPARIAN RIGHTS.—If the boundary line of a public street and a navigable lake meet, the riparian rights incident to the land composing the street belong to the public, although the qualified title to the street is in private hands.

MUNICIPALITIES MAY MAINTAIN ACTIONS FOR INJUNCTIONS to prevent interference with their streets.

Appeal from a judgment restraining defendants from placing a fence along a public street line to obstruct the passage therefrom to the adjoining waters of a navigable lake.

T. W. Haight, for the appellants.

Ryan & Merton, for the respondent.

274 MARSHALL, J. It is the settled law that submerged lands of lakes within the boundaries of the state belong to the state in trust for public use, substantially the same as submerged lands under navigable waters at common law. Upon the admission of the state into the Union the title to such lands, by operation of law, vested in it in trust to preserve to the people of the state forever the common rights of fishing and navigation and such other rights as are incident to

public waters at common law, which trusteeship is inviolable, the state being powerless to change the situation by in any way abdicating its trust: *Priewe v. Wisconsin etc. Co.*, 93 Wis. 534; *Willow River Club v. Wade*, 100 Wis. 86; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387-452; *Shively v. Bowlby*, 152 U. S. 1; *Revell v. People*, 177 Ill. 468, 69 Am. St. Rep. 257.

The title of the state to submerged lands and the inviolability of the state's trustee relation thereto as indicated is not questioned by appellants, but it is contended, as regards the lake in question, that the state's title is limited to lands that were covered by water before the lake level was artificially raised; that though the artificial water line now reaches the street, there is a strip of submerged land between that and the boundary of the former lake level, conceded to belong to defendants if their theory of the law is correct, to which the state has no title and which they have a right to reclaim from its artificial condition and to exclude the public therefrom. So the primary question upon which the appeal really turns is, Has the maintenance of the artificial level of the lake for upward of twenty years given to the new level, as regards title to submerged lands, all the characteristics ²⁷⁵ of a natural lake to the same extent? The trial court answered that in the affirmative. No other conclusion could have been reached consistent with recent decisions of this court on the same subject. In *Smith v. Youmans*, 96 Wis. 103, 65 Am. St. Rep. 30, it was held that an artificial condition of a watercourse or body of water, maintained for such length of time as to confer the right by prescription to maintain it permanently, is to all intents and purposes the natural condition. That was a case of the artificial maintenance of an artificial lake level for more than twenty years substantially the same as in this case. True, the ultimate question for decision was, Has a riparian proprietor, in the circumstances mentioned, the right to insist upon the artificial level of the water being maintained? But the conclusion was reached as a deduction from the general principle that an artificial condition of a body of water, maintained for more than twenty years under such circumstances as to extinguish the right of the owners of land affected by it to object to its continuance, becomes its natural condition with all the incidents thereof. The same subject was before the court again in the very recent case of *Mendota Club v. Anderson*, 101 Wis. 479. True, the question there was whether the common rights of fishing and navigation extended corre-

spondingly to an artificially increased level of the lake that had been maintained for about half a century, and it was decided in the affirmative. But as in *Smith v. Youmans*, 96 Wis. 103, 65 Am. St. Rep. 30, the result was reached as a deduction from the principle that an artificial condition, by lapse of time, under such circumstances as were shown, becomes the natural condition. Having determined the governing legal principle, it was said in the first case that riparian rights must be determined with reference to the artificial level the same as if it were the natural level; and in the last case that the right to fish and hunt and navigate must be determined with reference to the artificial condition, the same as if it were the natural condition; and in this case the ²⁷⁰ court held that the title to the bed of the lake must be determined with reference to the artificial level of the water the same as if it were the natural level. It can easily be seen that each conclusion was a logical result of the existence of the principle common to all. There is no escaping that. If the principle is right the results followed necessarily. When we say that the new level of the lake has become its natural level, we say that the title to all the submerged lands in the present condition of things is in the state; that the entire body of water is subject to the common right of fishing and navigation and to the other incidents of navigable waters, and that the title to lands bordering on the lake stops at precisely the same line that would govern if the water, in a state of nature, reached to the height of its artificial condition.

The above-stated principle having been, upon due consideration, firmly declared to be the law on the several occasions indicated, it is sufficient now to refer to our previous adjudications without rediscussing the subject at length or reviewing the holdings of other courts. Our attention is called to some authorities to the effect that mere permissive use by one or several persons of the property of another, however long continued, will not take the title of the latter and vest it in the former. That doctrine is familiar, but we fail to perceive its application to this case. The land in controversy here was artificially taken into the lake by the owner about the time the land was acquired from the United States in 1839, and its condition in that regard has been since maintained by those in the chain of title from the original owner down to about the time of the commencement of this action. When the owner of the land raised the lake level so as to cover it, such land im-

mediately became subject to use by the public as a part of the natural lake bed, not by permission of the owner of the paper title, but by the same right that the public used any other part of the lake. The owner of ²⁷⁷ the land possessed no right to exclude the public therefrom so long as the waters of the lake were caused to flow over the same. The principle is well settled that if the volume or expanse of navigable waters be increased artificially, the public right is correspondingly increased: *Whisler v. Wilkinson*, 22 Wis. 572; *Volk v. Eldred*, 23 Wis. 410; *Weatherby v. Meiklejohn*, 56 Wis. 73; *Smith v. Youmans*, 96 Wis. 103, 65 Am. St. Rep. 30; *Mendota Club v. Anderson*, 101 Wis. 479. As the chief justice put it in *Mendota Club v. Anderson*, 101 Wis. 479, the public may use the increased volume of water the same as though it had always been in that condition; that the right existed from the start. So long as the artificial condition existed, the person holding the title to submerged lands could not exclude the public therefrom.

It is not difficult to see how a person who, by artificial means, makes his land a part of the bed of a navigable lake so that the water flowing over the same is rightfully used as a part of the public waters and continues that situation for a long time, loses the right to change the condition. The creation of the condition, knowing that the public will have a right to enjoy it, necessarily carries with it a presumed intention that they shall enjoy it. A person is presumed to intend the natural consequences of his deliberate acts. A situation once created and continued for such length of time that it would be considered a violation of good faith to the public for the person responsible for it to change his position and restore the original situation, brings into play the principle of estoppel in pais, which precludes him from revoking what is legally considered a dedication of his land effected by his acts to the public use: 3 *Washburn on Real Property*, 79. Riparian proprietors may make non-navigable waters, even, public waters by dedication: *Yates v. Judd*, 18 Wis. 118. Uninterrupted and continuous use, acquiesced in for twenty years, constitutes conclusive proof of dedication: *Lemon v. Hayden*, 13 Wis. 159; *Wyman v. State*, 13 Wis. 663. ²⁷⁸ It does not militate against the effectiveness of acts to create a right to land by dedication that the owner does not so intend, if such be the legal effect of his conduct: *Williams v. Smith*, 22 Wis. 594. Applying those principles to the facts of this case, it is easily seen that the conduct of the owners of the property in dispute in this case, in maintaining

an artificial condition of the waters of Pewaukee lake for some fifty years, which they knew gave to the public the right to enjoy it as a natural condition, hence intended that such should be done, and the use accordingly operated most effectively to dedicate all lands owned by them affected by such condition to the public use, and to surrender to the proper custodian of lands devoted to such use the title necessary to maintain and protect it. There is no taking of lands for public use contrary to the will of the owner without just compensation in the circumstances of this case, but a mere acceptance of lands voluntarily surrendered to the public use by the owner, which surrender, by reason of the facts, the owner is precluded from revoking or interfering with, so that as a consequence, in effect at least, the title to the lands is vested in the state to the same extent as that of lands constituting the original natural bed of the lake.

It follows from the foregoing that the public right to the bed of Pewaukee lake within the limits affected by the judgment appealed from reaches to the line of the street; and it necessarily follows that defendants have no right, by reason of a qualified title to the street on the side toward the lake, if they have such qualified title, to claim riparian rights as an incident thereto. In such situations the wharfing privileges and other incidents of the shore are appurtenant to the public right in the street, leaving no line of paramount private right between the street and the water. Said Justice Matthews, in *Potomac S. Co. v. Upper Potomac S. Co.*, 109 U. S. 672: "It never was questioned that, as to streets whose termini abutted on the river, the waterfront was subject to ²⁷⁰ the riparian rights of the public for use as wharf, dock, or landing places." And the same rule applies to a situation where the street line and the water line coincide. The true inference to be drawn from so locating a street is that it was intended to secure to the public those very rights, and to prevent private monopoly of the landing places for trade and commerce. To the same effect is *Rowan v. Portland*, 8 B. Mon. 232, where it was held that if a street line and the line of a navigable river coincide, the wharfing privileges are in the public to the exclusion of the original proprietor. Likewise, in *People v. Lambier*, 5 Denio, 9, 47 Am. Dec. 273, it was held, in effect, that where a public street connects with navigable waters, the fact that the fee of the street is in private hands does not permit the taking, by reason of private ownership, of land beyond the

original street boundary for private purposes; that the result of a filling up beyond the original terminus of the street will be to extend the street correspondingly so as to preserve the right of public passage from the water to the street and from the street to the water. In *Barclay v. Howell*, 6 Pet. 498, a claim inconsistent with the foregoing was thus repudiated: To contend that between the boundary of a street and the public right to navigable water, where the two meet, as in case of the existence of a street bounded by a navigable river, a private right can exist and be exercised hostile to the public right, is unreasonable and against law. For further authorities on the subject, see *Newport v. Taylor*, 16 B. Mon. 699; *Barney v. Keokuk*, 94 U. S. 324; *New Orleans v. United States*, 10 Pet. 662; *Godfrey v. Alton*, 12 Ill. 29, 52 Am. Dec. 476; *Backus v. Detroit*, 49 Mich. 110, 43 Am. Rep. 447.

A suggestion is made in regard to the right of the village corporation to maintain this action. That subject is covered by *Madison v. Mayers*, 97 Wis. 399, 65 Am. St. Rep. 127, and many previous cases in this court. A municipality may maintain an action for an injunction to prevent interfering with its streets. There ²⁸⁰ are many instances in our reports where the right to maintain such actions has been sustained: *Neshkoro v. Nest*, 85 Wis. 126; *Jamestown v. Chicago etc. Ry. Co.*, 69 Wis. 648; *Oshkosh v. Milwaukee Ry. Co.*, 74 Wis. 534, 17 Am. St. Rep. 175; *Waukesha etc. Co. v. Waukesha*, 83 Wis. 475; *Eau Claire v. Matzke*, 86 Wis. 291, 39 Am. St. Rep. 900. The question seems to have been so completely foreclosed as not to be open to discussion. The right to maintain the action is based on the duty of the municipality to maintain its streets in a proper condition for public travel. By subdivision 11, section 893, of the Statutes of 1898, village corporations are expressly empowered to prevent the obstruction of their streets. That has been held to carry with it by implication the right to maintain an action for injunctive relief as an appropriate means for carrying out the express power: *Buffalo v. Harling*, 50 Minn. 551. Standard textwriters support the same doctrine: *Beach on Injunctions*, secs. 1284, 1285. It applies here, as the real purpose of this action was to prevent threatened obstruction to the proper use of a street.

What has been said seems to cover all questions of sufficient moment to require special mention in this opinion.

By the Court. The judgment of the circuit court is affirmed.

WATERS AND WATERCOURSES—SUBMERGED LANDS.—

The navigable waters of a state and the lands thereunder belong to the state: *Priewe v. Wisconsin State Land etc. Co.*, 103 Wis. 537, post, p. 904. The waters of meandered lakes and the land under them are held by the state in trust for the people: *Fuller v. Shedd*, 161 Ill. 462, 52 Am. St. Rep. 380; *Noyes v. Collins*, 92 Iowa, 566, 54 Am. St. Rep. 571. The title to the lands under the Great Lakes belongs to the state wherein the lands are located, and each state holds the fee in trust for the public in the same way that it holds the title to soil under tide waters by the common law: *Revell v. People*, 177 Ill. 468, 69 Am. St. Rep. 257. See, further, on this subject, *Sage v. Mayor*, 154 N. Y. 61, 61 Am. St. Rep. 592; *Stanberry v. Mallory*, 101 Ky. 49, 72 Am. St. Rep. 389; and the extended note to *People v. Kirk*, 53 Am. St. Rep. 289-300.

WATERS—DAMS—PRESCRIPTIVE RIGHTS.—The right to flow lands or to raise water by means of a dam may be acquired by an uninterrupted adverse enjoyment for the statutory period: Monographic note to *McCoy v. Danley*, 57 Am. Dec. 688, 689; and the artificial state or condition founded upon prescription becomes a substitute for the condition previously existing, and from it arises a right on the part of those interested to have the new condition continued. Hence, the right of shore-owners to insist that one who has raised the waters of a lake by means of a dam, and acquired a prescriptive right to do so, shall not remove the dam to their detriment: *Smith v. Youmans*, 96 Wis. 103, 65 Am. St. Rep. 30.

MUNICIPAL CORPORATIONS—INJUNCTIONS.—A city in its corporate capacity may maintain a suit in equity to obtain an injunction to prevent threatened obstructions or serious unlawful injuries to public streets: *Eau Claire v. Matzke*, 86 Wis. 291, 39 Am. St. Rep. 900; *Madison v. Mayers*, 97 Wis. 399, 65 Am. St. Rep. 127.

WHEREATT v. ELLIS.

[103 WISCONSIN, 348.]

APPEAL BONDS.—A bond on appeal from an intermediate order given as terms of a stay of proceedings pending the appeal and conditioned for the payment by the party appealing of any judgment finally recovered, in an action, refers to such judgment as may finally be recovered in that action in the trial court.

APPEAL BONDS—CONSIDERATION.—If an appeal bond is given to obtain a stay of proceedings pending the appeal, such stay is a sufficient consideration for the bond.

SURETYSHIP—THE DISCHARGE OF THE PRINCIPAL in a bond, by operation of law, does not discharge the sureties therein.

APPEAL BONDS—LIABILITY OF SURETIES—DISCHARGE OF PRINCIPAL.—If an appeal bond is conditioned to pay any judgment finally recovered in the action, the regular recovery of a judgment therein and the failure of the appellant to pay it render the sureties on the bond liable, although the principal may have been previously discharged from his liabilities under insolvent laws.

BONDS—AMOUNT RECOVERABLE.—In an action on a penal bond, the amount recoverable is not limited by the penalty.

It may also include damages in excess of the penalty, with interest.

BONDS—AMOUNT RECOVERABLE.—If the damages to secure which a penal bond is given exceed the penalty and draw interest, the penalty also draws interest, and the recovery against the sureties may include both the penalty and such interest.

BONDS—DAMAGES FOR BREACH—AMOUNT RECOVERABLE AGAINST SURETIES—INTEREST.—If the circumstances are such that the principal is chargeable with interest on the damages accruing from the breach of an appeal bond, and such damages are equal to or exceed the penalty named in the bond, the interest period on such penalty commences at the same time as that against the principal on such damages, and when the bond is breached, the penalty, to the amount of the damages, immediately becomes the debt of the sureties, and bears interest the same in all respects as any other debt due on contract, if the principal claim bears interest.

SURETYSHIP—LIABILITY OF SURETY FOR INTEREST—DEMAND.—If a demand upon the principal is necessary to start interest running against him, it is necessary as to his sureties. If the claim is wholly unliquidated so that a demand will not start interest against the principal, it will not start it against his sureties.

SURETYSHIP—LIABILITY OF SURETY FOR INTEREST. Interest on the penalty in an appeal bond, conditioned for the payment of any judgment recovered against appellant in the trial court, commences from the date of such judgment to run against his sureties on the amount of the penalty, when the damages recovered in the trial court exceed the amount of such penalty.

Action against the sureties on an appeal bond given by the defendant, Ellis, and his codefendants, as sureties, in the sum of one thousand dollars, conditioned that he would pay to the plaintiff, Whereatt, such judgment as he might recover in the action appealed from. Under the bond a stay of proceedings was had. The order appealed from was affirmed by the supreme court, and thereafter plaintiff recovered judgment against defendant in the original action for nineteen hundred and forty dollars and twenty-five cents, of which he collected from defendant five hundred and fifty dollars. Before the rendition of such final judgment, but after the case had been finally tried and submitted, the defendant, Ellis, was discharged of his liabilities under the insolvent laws of the state. Thereafter this action was commenced against the sureties named in the appeal bond to recover the amount named therein as a penalty, together with interest from the date of the judgment against Ellis. Plaintiff recovered judgment and the sureties in the bond appealed.

Wickham & Farr, for the appellants.

L. A. Doolittle and A. J. Sutherland, for the respondent.

351 MARSHALL, J. The first suggestion as regards why the judgment appealed from is wrong is that the bond was for the payment of the judgment rendered in the supreme court, not that rendered in the circuit court. We are unable to see any merit in that contention. The appeal bond for costs covered the only judgment that by any possibility could have been contemplated as a result that might be reached on the appeal. The only other judgment that could have been in the minds of the parties, as one that might be subsequently obtained, was that which plaintiff did obtain in the circuit court after the determination of the appeal; so the conclusion is reached that the bond was given to secure, to the extent of one thousand dollars, the circuit court judgment, as respondent contends.

It is further said in support of the appeal that the bond or undertaking is without consideration. The stay order was one that the trial judge was authorized to grant or refuse in his discretion. It was competent to grant the stay upon reasonable terms. Defendant gave the security as a consideration for the stay and enjoyed the benefit of it pending the appeal. That was ample consideration for the bond. None of the large number of cases cited to our attention on this point appears to bear on the subject adversely to our conclusion. The case here does not involve an unnecessary or unauthorized undertaking, or an undertaking contrary to the statute. The undertaking was properly required by the trial court and was given and received in accordance with the order of the court.

It is further said that the undertaking was not delivered; and in support of that statutes are cited in regard to undertakings required thereby. The undertaking in question was not required by any statute regulating the manner of its service. It was a bond required pursuant to judicial discretion and was served in precisely the manner ordered by the court. It would be useless to multiply words to show that such a service is sufficient.

352 It is contended that the sureties were discharged by a discharge of the principal. The circumstance mentioned in the undertaking required to fix the liability of the sureties was the rendition of judgment against the principal in the pending action in the circuit court. That circumstance occurred. The subsequent perpetual stay of execution to enforce the judgment, granted in proceedings adverse to the plaintiff, did not affect the liability of the sureties. Before

it was granted the right of plaintiff to proceed against the sureties on the undertaking had become a vested right to property, and it could not be divested by a discharge of the principal by operation of law. That is elementary. The numerous cases cited by appellants' counsel to an opposite view, when carefully examined, do not support it. *Wolf v. Stix*, 99 U. S. 1, seems to be the leading case on the subject. A reference to that case shows that the court decided, in effect, that if security be given that a party to an action will pay any judgment that may be rendered against him in an action, and judgment is never rendered because prevented by a discharge of the principal in the bond, the sureties cannot be held, for the obvious reason that the contingency upon which their liability was made to depend was rendered impossible by the discharge. *Sigler v. Shehy*, 15 Ohio, 471, is to the same effect. Judgment was never rendered against the principal in the bond, but was rendered against his assignee in insolvency, who prosecuted in place of the principal. It was held that a personal judgment against the principal was requisite to fix the liability of the sureties. *Odell v. Wootten*, 38 Ga. 225, and the other cases cited by appellants' counsel that treat directly of the question are to the same effect. Brandt on Suretyship and Guaranty, section 150, states as elementary that a discharge by operation of law does not affect the sureties on the bond of the person discharged. The following in *Phillips v. Solomon*, 42 Ga. 192, is quoted: "The discharge of the principal, which discharges ³⁵³ a surety, must be a discharge by some act or neglect of the creditor, and a discharge by operation of law, being, as it is, against the consent and beyond the power of the creditor, does not discharge the surety."

Lastly, it is contended that the court erred in allowing a recovery in excess of the penalty of the bond. It was an ancient doctrine, and is still followed to some extent in England, that the penalty in a penal bond limits the amount of the recovery, however much the actual damages of the obligee may be. The practice formerly was to sue for the penalty and take judgment therefor, with a provision for enforcing the judgment to the amount of plaintiff's damages, adjudicated in the action and fixed by the judgment. The strict rule that a recovery cannot in any event exceed the penalty in the bond has very little support in this country, and the practice in most jurisdictions has been done away with of taking a judgment in form for the penalty and issuing execution for actual damages, the matter

being regulated by statute providing for the entry of judgment for the actual damages. Such is the situation in this state: Rev. Stats. 1878, sec. 2890; *Heidtke v. Krause*, 97 Wis. 118.

In accordance with the great weight of American authority the judicial rule here, as to interest, is that when the damages for the breach of a penal bond exceed the penalty, the obligee is entitled to interest on the penalty, the interest period, however, to be controlled by the right of the obligee to interest upon the damages against the principal. That is to say, when the circumstances are such that the principal is chargeable with interest on the damages accruing from the breach of a bond and such damages are equal to or exceed the penalty, the interest period on such penalty will commence at the same time as that against the principal on such damages: *Clark v. Wilkinson*, 59 Wis. 543. When the bond is breached under this rule, the penalty, to the amount of the damages, immediately becomes the debt of the sureties ³⁵⁴ and bears interest the same in all respects as any other debt due on contract, if the principal claim bears interest. If the damages are certain as to amount, or may be made certain approximately, either by mere computation or by reference to known market values—in short, if the damages are not of the class known as wholly unliquidated, a demand on the principal starts the interest period running against him; hence against his sureties. If no demand is necessary to start the interest period against the principal, none is required against the sureties.

This court omitted to decide in *Clark v. Wilkinson*, 59 Wis. 543, as to when the interest period on the penalty of a bond, if recoverable, commences—whether from the commencement of the action or the time of the breach of the bond. It was said that the cases elsewhere are not harmonious on the subject. An examination of the adjudications of other courts shows that only a few are out of harmony with the rule that the time of the breach of the bond fixes the beginning of the interest period, if the principal is liable for interest from that time: *Sutherland on Damages*, sec. 477; *United States v. Arnold*, 1 Gall. 348. The opinion on the subject in the latter case is by Justice Story. The following words are used: "I think the true principle, supported by the better authority, is that the court cannot go beyond the penalty and interest thereon from the time it becomes due by the breach." In *Wyman v. Robinson*, 73 Me. 384, 40 Am. Rep. 360, the court, by Peters, J., speaking on the subject said, in substance: "It is commonly said that

damages cannot exceed the penalty of a bond. Rightly understood, that is true. It limits the amount the sureties agreed to pay, but they agreed to pay that amount if the damages suffered by the obligee should equal it, immediately upon the breach of the bond. So, in such circumstances, if the full penalty be paid at the date the bond is breached, an obligee will get no more than the sureties agreed to pay. If the obligation of the sureties be not met at the time of ³⁵⁵ the breach by the principal, they become liable for interest from that time because of their failure to perform the contract." To the same effect are *United States v. Curtis*, 100 U. S. 119; *Bank of Brighton v. Smith*, 12 Allen, 243, 90 Am. Dec. 144; *Leighton v. Brown*, 98 Mass. 515; *Frink v. Southern Exp. Co.*, 82 Ga. 33; *Burchfield v. Haffey*, 34 Kan. 42.

The question of whether interest on the penalty was recoverable in this case is determinable by the rules that govern other money demands on contracts. That is, from the time it ought to have been paid if the sum was then certain as to amount or could be made reasonably certain by computation or otherwise; or, in other words, if the claim was not of the character called wholly unliquidated.

If the amount claimed down to the time of the determination in this suit remained wholly unliquidated, then no interest on the penalty could properly have been recovered prior to that time. If the breach of the bond was complete without a demand on the principal or sureties, and the claim was not wholly unliquidated, then such demand was not necessary to set the interest period running against the sureties; otherwise a demand was necessary. The commencement of a suit has no significance on the question of interest except as it constitutes a demand. So if a demand would not have started the interest period in operation the commencement of the suit did not. This subject was recently so fully covered by Mr. Justice Dodge, in *Laycock v. Parker*, 103 Wis. 161, that more need not be said in regard to it here.

Applying the foregoing to this case, it is held that the trial court rightly allowed interest on the penalty from the time of the rendition of the judgment in the principal action. That judgment fully settled the amount of the damages that plaintiff was entitled to recover of the principal in the bond, and the interest commenced to run thereon at once under the statute in regard to interest on judgments. The debt of the principal, so far as relates to the liability of ³⁵⁰ the sureties on the bond,

was due and payable without demand as soon as the judgment was rendered; therefore, the breach of the bond was completed by the obligor's failure to make such payment. The amount of the judgment as diminished by collections made thereon exceeded the penalty on the bond; therefore interest commenced to run from the time of the forfeiture, the date of the judgment referred to. Such was the ruling of the trial court, and the judgment appealed from must be affirmed accordingly.

By the Court. The judgment of the circuit court is affirmed.

APPEAL BONDS.—THE CONSIDERATION for an appeal bond, which is sustained though the statute has been complied with only substantially, is generally said to be the prejudice received by the appellee owing to the stay of the execution of the judgment: See monographic note to *Howell v. Alma Milling Co.*, 38 Am. St. Rep. 704.

APPEAL BONDS.—WHAT JUDGMENT the sureties on an appeal bond bind themselves to satisfy is discussed in the extended note to *Howell v. Alma Milling Co.*, 38 Am. St. Rep. 706-708.

APPEAL BONDS—DISCHARGE OF PRINCIPAL.—Though there is authority to the contrary, the better rule seems to be that the discharge of a judgment debtor under the bankruptcy laws does not release the sureties on his appeal bonds: See extended note to *Howell v. Alma Milling Co.*, 38 Am. St. Rep. 711.

APPEAL BONDS—MEASURE OF RECOVERY ON.—A surety may be held liable, not only for the amount of the principal demand, but also for the costs of the suit and damages for the detention of the debt, provided the total does not exceed the penalty fixed. If the judgment carries interest, the surety is chargeable with interest thereon from the time it was rendered: See monographic note to *Howell v. Alma Milling Co.*, 38 Am. St. Rep. 715-717.

EINGARTNER v. ILLINOIS STEEL COMPANY.

[103 WISCONSIN, 373.]

LIMITATION OF ACTIONS—CONFLICT OF LAWS.—If a citizen of one state having a claim against another such citizen allows the period limited by law for its enforcement to expire, he cannot then go into another state and enforce such claim in its courts. In such case the defense of the statute of limitations is a vested property right, subject to constitutional protection.

LIMITATION OF ACTIONS—VESTED RIGHTS.—A completed period of statutory limitation upon the enforcement of a claim not only takes away the remedy for such enforcement, but the claim also, and the bar of the statute becomes a vested right.

LIMITATION OF ACTIONS—VESTED RIGHTS—CONSTITUTIONAL LAW.—If the statute of limitations has run against a demand, the demand is gone, for the reason that the defense of the bar of the statute is a vested right which the legislature cannot

take away, either by repeal or affirmative act. This rule applies whether the limitation affects real or personal property, or a claim on contract or sounding in tort. The right to the defense of the statute, when fully vested, is as valuable a property right as a right of action, and is equally subject to constitutional protection.

LIMITATION OF ACTIONS—DEFENSE—VESTED RIGHT—CONFLICT OF LAWS.—If the operation of the statute of limitations upon the remedy is complete, the right to the benefit of the bar thus created is property, and protected as such by constitutional guaranty, like any other property, and such protection goes with its possessor into any jurisdiction into which he may travel.

J. W. Wegner and C. H. Van Alstine, for the appellant.

Van Dyke, Van Dyke & Carter, for the respondent.

375 MARSHALL, J. This is the sole question we are called upon to decide in this case: If a citizen of a sister state, having a claim against another such citizen, allow the period limited by law for its enforcement in the courts of such state to expire, can he then come into this state and enforce such claim in its courts if the necessary service can be obtained to give the court jurisdiction of the defendant in the action?

It is conceded that the effect of the statute of limitations of this state extinguishes the right upon which it has completely operated: *Brown v. Parker*, 28 Wis. 21; *Knox v. Cleveland*, 13 Wis. 245; *Sprecher v. Wakeley*, 11 Wis. 432; *Kahn v. Lesser*, 97 Wis. 217. It is further conceded that if the statute of limitations of the state of Illinois has the same effect, plaintiff's claim was extinguished before this action was commenced, and hence defendant was entitled to the judgment rendered. It is the universal rule that so long as a limitation act operates on the remedy only, the law of the forum governs. When the right itself has been extinguished by the effect of the limitation act upon it, such effect attaches to and becomes inseparable from such right in the courts of this state.

Expressions of like character as above are found in numerous adjudications, yet the subject is frequently reviewed by the courts for want of an accurate understanding of terms. In *Baker v. Stonebraker*, 36 Mo. 338, this statement of the rule was made: "The doctrine is well established that where the limitation operates to extinguish the contract or debt, the case no longer falls within the law of limitations on the remedy merely. In such cases when the debt or judgment is sued on in another state, the *lex loci contractus*, and not the ³⁷⁶ *lex fori*, is to govern." To the same effect are *Story on Conflict of Laws*, sec. 582; *Shelby v. Guy*, 11 Wheat. 361; *Perkins v. Guy*,

55 Miss. 153, 30 Am. Rep. 510; Woodman v. Fulton, 47 Miss. 682; McCracken Co. v. Mercantile T. Co., 84 Ky. 344; Wires v. Farr, 25 Vt. 41; Whitehurst v. Dey, 90 N. C. 542; Wood on Limitations of Actions, sec. 13.

What is meant by the term "extinguish the right" as used in the adjudications and by the textwriters, in discussing the subject under consideration, is not actual satisfaction of the right by the operation of the statute of limitations. The idea is that a right to insist upon the statutory bar is a vested property right protected by the constitution, the effect of which is to forever prevent the judicial enforcement of the demand affected by it, against the will of the owner of the prescriptive right. Deprivation of the remedy under such circumstances that there can be no adverse restoration of it is a destruction or extinguishment of the right to which such remedy relates. The law deals only with enforceable rights, and if such a right be changed to a mere moral obligation, in a legal sense it no longer exists at all.

It follows necessarily that when a defense to a right has become vested beyond recall without consent of the person in whose favor it operates, so that his adversary is powerless to enforce such right beyond power of adverse restoration, it is, to all intents and purposes, as effectually satisfied as if paid or otherwise discharged. As the court put it in Woodman v. Fulton, 47 Miss. 682: "The bar created by the statute of limitations is as effectual as payment or any other defense, and when once vested cannot be taken away even by the legislature." That is the doctrine of this court expressed in many cases. In Sprecher v. Wakeley, 11 Wis. 432, this rule was approved as to the effect of a completed limitation period upon the title to property. A bar produced by operation of the statute of limitations to an action upon a contract is as effectual as payment or any other defense, and although ³⁷⁷ it is a general principle that the statute bars only the remedy and does not destroy the right, yet where the defense has been vested no subsequent renewal of the right to sue, as by repeal of the statute or otherwise, without consent of the party entitled to the defense, operates to take away or destroy such defense. In Brown v. Parker, 28 Wis. 21, the rule was decided to apply to property rights as well as to tangible property, on the ground that a vested right of defense is itself property and supersedes, annuls, and extinguishes that upon which it operates. That doctrine has ever since been the law of this state, and it is now too firmly entrenched in our jur-

isprudence to be open to question, whatever may be the individual or even collective opinions of judges as to whether the question was settled right or wrong originally: *Pleasants v. Rohrer*, 17 Wis. 577; *Austin v. Saveland*, 77 Wis. 108; *Howell v. Howell*, 15 Wis. 55; *Lindsay v. Fay*, 28 Wis. 177; *Arimond v. Green Bay etc. Co.*, 31 Wis. 316; *Carpenter v. State*, 41 Wis. 36; *Pierce v. Seymour*, 52 Wis. 272, 38 Am. Rep. 737. Nevertheless, we should say that the logic of the opinion in *Brown v. Parker*, 28 Wis. 21, and in the cases which preceded and followed, treating of the subject, is far more satisfactory than that of decisions elsewhere holding that there cannot be a property right in a defense, and that one's financial safety, so far as relates to money demands, is hedged about by state lines, and even there may be the subject of legislative interference. The reasoning that gives to limitation acts, as regards all property, interests, and claims, the effect of an irrevocable sentence of silence which is protected as property by constitutional guaranties, is reasonable in our judgment. We are not unmindful of the fact that this doctrine is not sustained by the supreme court of the United States, but that cannot change our views at this late day as to the effect of our own statute, nor as to the effect in this state of the statutes of a sister state, which have received at home the same construction given to similar ³⁷⁸ statutes here. As said in *Pierce v. Seymour*, 52 Wis. 272, 38 Am. Rep. 737, it is the settled law in this state that a completed statutory period of limitations upon the enforcement of a claim not only takes away the remedy for such enforcement, but the claim also.

The foregoing conclusion differs from the views of the federal supreme court, as before indicated, in that it is there held that a mere defense of the statute of limitations is not a property right upon which constitutional guaranties can operate; that unless coupled with title to property the bar of the statute in one jurisdiction will not be effective in another; that as to mere money demands it operates on the remedy only, and the law of the forum governs. It is there recognized, as held in this opinion, that the point of difference between the two doctrines is whether a defense of the statutory bar to the enforcement of a right is itself property, and that the effect of an affirmative holding is that such property right extinguishes the right upon which it operates. In the leading case on the subject—*Campbell v. Holt*, 115 U. S. 620—the court divided. Justice Miller, who delivered the opinion upon which the deci-

sion was based, remarked: "We are unable to see how a man can be said to have a property right in the bar of the statute as a defense to his promise to pay. In the most liberal extension of the use of the word 'property,' it is new to call the defense of lapse of time to the obligation to pay money 'property.'" On the other hand, Justice Bradley, with whom Justice Harlan concurred, in a dissenting opinion replete with unanswerable logic, said the constitutional guaranty against deprivation of property without due process of law "was intended to protect every valuable right which a man has. The term 'property' [in the constitutional provision] embraces all valuable interests which a man may possess outside of himself; that is to say, outside of life and liberty." It "extends to every species of vested right. . . . An exemption from a demand or an immunity ³⁷⁹ from prosecution in a suit is as valuable to the one party as the right to the demand or to prosecute the suit is to the other. The two things are correlative, and to say that the one is protected by constitutional guaranties and the other not seems to me almost an absurdity. My property is as much imperiled by an action against me for money as it is by an action against me for my land or my goods. Is not a right of defense to such an action of the greatest value to me? If it is not property in the sense of the constitution, then we need another amendment to that instrument; but it seems to me there can hardly be a doubt that it is property." The opinion is supported by an abundance of authority cited. It states the doctrine of this court on the subject with strict accuracy. It remains to be seen whether the doctrine of the Illinois court is the same.

Now, notwithstanding numerous statements by the Illinois supreme court that the statute of limitations acts on the remedy, if it holds that a completed statutory period of limitation in favor of a person charged with a liability is a vested property right, that, as indicated, is the same as holding that it extinguishes the right affected by it. In other words, while the test of whether the statute of limitations of Illinois, when fully run upon a claim, bars the right to such claim in the courts of this state, is whether it extinguishes such right in Illinois, the test of whether such is its effect in such state is whether the right to the benefit of the statutory bar is there considered a constitutional privilege that cannot be taken from its possessor adversely.

In the light of the foregoing, we turn to Board of Education v. Blodgett, 155 Ill. 441, 46 Am. St. Rep. 348, and there find

the principle decided in *Brown v. Parker*, 28 Wis. 21, announced as the law of that state. The court said, in substance, that when the statute of limitations has run against a demand, the demand is gone, because the defense of the bar of the statute is a vested right which the legislature cannot take away, either ³⁸⁰ by a repeal of the statute or by an affirmative act, and that the rule applies whether the limitation affects real or personal property, or a claim on contract or sounding in tort; that the right to a defense, when fully vested, is as valuable as a right of action, and is equally subject to constitutional protection. No expression found in the books goes further than that, not even the dissenting opinion of Justice Bradley in *Campbell v. Holt*, 115 U. S. 620. In a still later case—*Fish v. Farwell*, 160 Ill. 236—the court said: “A right of defense against a money demand arising from the complete running of the statute of limitations is property within the protection of the constitutional guaranty of due process of law.”

Now, to go further with the Illinois cases would serve no valuable purpose. It may be conceded that there are many expressions found in them to the effect that limitation acts operate on the remedy, as in *Suppiger v. Gruaz*, 137 Ill. 216, to which our attention was particularly invited. Such expressions, however, are not inconsistent at all with the undoubted rule of the Illinois court that when the operation of the statute upon the remedy is complete the right to the benefit of the bar thus created is property and protected as such by the constitutional guaranty like any other property, and that such protection goes with its possessor into any jurisdiction into which he may travel.

So, it is as plain as English words can state it that the bar of the statute of limitations of Illinois, upon a remedy in its courts, is a vested property right which forever extinguishes there a cause of action upon which it operates; therefore such bar is likewise effectual here if seasonably pleaded and insisted upon. That was done in this case, and it warranted the judgment appealed from.

By the Court. The judgment of the superior court is affirmed.

Dodge, J., dissented.

LIMITATION OF ACTIONS—CONFLICT OF LAWS.—If an action is barred by the law of the place of a defendant's residence, it is barred in another state the same as though it had arisen there:

Riser v. Snoddy, 7 Ind. 442, 65 Am. Dec. 740. This is true if the statute has extinguished the right of action, but not if it has extinguished the remedy only: **Perkins v. Guy**, 55 Miss. 153, 30 Am. Rep. 510. See, too, **Carson v. Hunter**, 46 Mo. 467, 2 Am. Rep. 529, and the extended note to **Bulger v. Roche**, 22 Am. Dec. 363-366.

LIMITATION OF ACTIONS—VESTED RIGHTS.—The right to plead the statute of limitations after it has run and become a bar to a demand arising either *ex contractu* or *ex delicto*, is a vested right, and cannot be taken away by a subsequent statute: **Lawrence v. Louisville**, 96 Ky. 595, 49 Am. St. Rep. 309; **Board of Education v. Blodgett**, 155 Ill. 441, 46 Am. St. Rep. 348, and note.

KOWALKE v. MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY.

[103 WISCONSIN, 472.]

MISTAKE OF FACT, WHAT IS.—A mistake of fact is an unconscious ignorance or forgetfulness of the existence or nonexistence of a fact, past or present, material to the contract.

MISTAKE OF FACT, WHEN NOT RELIEVED AGAINST.—If a mistake is made as to some fact which, though connected with the transaction, is merely incidental, and not a part of the very subject matter or essential to any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it, the mistake is not ground for relief, either affirmative or defensive.

MISTAKE OF FACT, WHEN NOT RELIEVED AGAINST.—If parties have entered into a contract based upon uncertain or contingent events, purposely, as a compromise of doubtful claims arising from them, no rescission can be had on the ground of mistake of fact in the absence of bad faith, though the facts turn out very differently from the expectation of either or both of the parties.

MISTAKE OF FACT.—THE COMPROMISE of doubtful claims for personal injury is highly favored by the law, and any contract by which there is a fair meeting of the minds of the parties to that end must be adopted by the courts. The question in each case is, Did the minds of the parties meet upon the understanding of the payment, and acceptance of something in full settlement of the defendant's liability? If they did, without fraud or unfair conduct on either side, the contract must stand, although subsequent events may show that either party made a bad bargain, because of a wrong estimate of the damages which would accrue. Such compromise cannot be avoided for a mistake of fact.

MISTAKE OF FACT—PREGNANCY — RELEASE OF CLAIM FOR DAMAGES.—A mistake as to the pregnancy of a married woman, or a state of doubt as to such pregnancy, with a belief of the probability of its nonexistence, is not such a mistake as to an intrinsic fact as warrants the rescission of a release to a street-car company, executed by such woman, and her husband, in good faith, without fraud or unfair dealing by either party, of all claims for damages arising as the result of a fall from one of the company's cars.

Action to set aside a release of all claims for personal damages against a street-car company. Plaintiff was injured by

jumping from a street-car under such circumstances as to make the liability of the car company probable. Plaintiff's husband demanded a settlement for the injury from the car company, and he and his wife joined in a release, for a certain sum of money, of all claims or demands for damages against the company arising from the injury to her so received. He, by this suit, sought to annul such release, on the ground of a mutual mistake of fact as to the pregnancy of the woman injured at the time of the accident. Judgment for plaintiff and the defendant appealed.

Spooner, Rosencrantz & George, for the appellant.

F. S. Fish and G. W. Hazelton, for the respondent.

475 DODGE, J. The circuit court's finding of entire absence of anything like fraud perpetrated by the defendant or its representative upon the plaintiff is certainly not antagonized by the preponderance of the evidence. Indeed, the conduct of the defendant's physician seems to have been in accordance with the most scrupulous rules of professional and contractual ethics. He refrained from visiting the plaintiff for examination until he had secured, at the company's expense, the attendance of her regular physician. He at no time assumed to treat her or intrude upon the relations between her and her attending physician. He refrained from any negotiation for settlement until he could meet her in company with her husband. The judgment, however, proceeds exclusively upon what is termed by the court below "a mistake of fact," which is predicated upon the fourth finding, that both she and the defendant's physician "believed" she was not pregnant.

476 To formulate an accurate and practically applicable definition of the mistake of fact which will warrant rescission of a contract has been apparently well-nigh the despair of law-writers. Indeed, no definition or general rule has been invented which is sufficient or accurate, except by immediately surrounding it with numerous exceptions and qualifications more important than itself. This is not surprising, in view of the fact that the whole doctrine is an invasion or restriction upon that most fundamental rule of the law, that contracts which parties see fit to make shall be enforced, and in view of the further consideration that one or both of the parties is often, if not usually, ignorant or forgetful of some facts, thoughtfulness of which might vary his conduct.

The most philosophical definition we have found is that presented by Pomeroy (Pomeroy's Equity Jurisprudence, sec. 839): "An unconscious ignorance or forgetfulness of the existence or nonexistence of a fact, past or present, material to the contract." This definition contains several elements, each of which, as above suggested, must be explained and qualified in its practical application. Thus, the ignorance must be unconscious; that is, not a mental state of conscious want of knowledge whether a fact which may or may not exist does so: Kerr on Fraud and Mistake, 432. This idea is involved in and furnishes a reason for the exception pointed out by Dixon, C. J., in *Hurd v. Hall*, 12 Wis. 112, 127, on authority of *Kelly v. Solari*, 9 Mees. & W. 54, viz.: "Where a party enters into a contract, ignorant of a fact, but meaning to waive all inquiry into it, or waives an investigation after his attention has been called to it, he is not in mistake in the legal sense. These limitations are predicated upon common experience that, if people contract under such circumstances, they usually intend to abide the resolution either way of the known uncertainty, and have insisted on and received consideration for taking that chance."

Akin to the rule that the ignorance must be unconscious, though going still further as an exception, is the other rule, ⁴⁷⁷ that ignorance must not be due to negligence, although there be no actual suspicion with reference to the fact in question: Pomeroy's Equity Jurisprudence, sec. 856; Kerr on Fraud and Mistake, 406; *Hurd v. Hall*, 12 Wis. 126; *Conner v. Welch*, 51 Wis. 431. The last case is a good illustration. A mortgagee took a new mortgage and released an old one on the understanding that his new lien took the place of the old, in ignorance of existence of a subsequent judgment against the mortgagor. The court held that because he had some knowledge of the latter's embarrassed condition, it was negligence not to have investigated as to judgments, and refused, notwithstanding the mistake, to rescind the transaction and reinstate his former lien.

Passing the requirement that the fact as to which mistake is made must be either past or present—for it is obvious that the coming into existence of any future fact must at the time of contracting have been understood to rest in conjecture, and the contingency thereof to have been assumed by both parties—another essential element of the definition is that the fact involved in the mistake must have been as to a material part of the contract, or, as better expressed by Mr. Beach (Beach on

Modern Equity Jurisprudence, secs. 52, 53), an intrinsic fact; that is, not merely **material** in the sense that it might have had weight if known, but that its existence or nonexistence was intrinsic to the transaction—one of the things actually contracted about. As, in the familiar illustration of the sale of a horse, the existence of the horse is an intrinsic fact. Another partial expression of this requisite, adopted by Mr. Pomeroy (Pomeroy's Equity Jurisprudence, sec. 856), is as follows: "If a mistake is made as to some fact which, though connected with the transaction, is merely incidental and not a part of the very subject matter or essential to any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it, in either case the mistake will not be ground for relief, affirmative or defensive." The last ⁴⁷⁸ part of this statement is adopted in *Klauber v. Wright*, 52 Wis. 303, 308; *Grymes v. Sanders*, 93 U. S. 55, 60.

Some illustrative cases of this aspect of the subject may serve to elucidate. The damaged condition of a ship at sea, as to which both parties to her sale are ignorant, held merely a collateral circumstance, and not an intrinsic fact: *Barr v. Gibson*, 3 Mees. & W. 390. Financial condition of a debtor is not intrinsic to a compromise and release of his debt, so that mistake thereon will justify rescission: *Dambmann v. Schulting*, 75 N. Y. 55, 63. Ignorance of declaration of peace, greatly enhancing value of merchandise, will not justify rescission of sale: *Laidlaw v. Organ*, 2 Wheat. 178. Sufficiency of security for a debt purchased as part of firm assets not intrinsic: *Segur v. Tingley*, 11 Conn. 134, 143. Certain United States bonds had been extended, and, as a result, were commanding premium in market; held not "of the essence" of a sale at par, both parties being ignorant as to both extension and premium: *Sankey v. First Nat. Bank*, 78 Pa. St. 48, 55. One who had built a mill partly on land of another purchased of that other two lots, both parties supposing them to include the mill, which, however, was found to be on a third lot. Court refused to rectify, holding that the contract related to purchase and sale of the lots named, and that, though presence of mill on one of them might have been an important consideration, it was not the fact as to which they contracted, not intrinsic to the transaction: *Webster v. Stark*, 10 Lea, 406. Fact that a specific tract of land contains less than supposed, not affecting identity of thing purchased, is not "of the very subject matter of the sale": *Thompson v. Jackson*, 3 Rand. 507, 15 Am. Dec. 721.

The foregoing is the principle on which is founded the rule well stated by Mr. Kerr (Kerr on Fraud and Mistake, 433), as follows: "Care must be taken in distinguishing cases where the parties are under a mutual mistake as to the subject matter of a contract from cases where there is no doubt as to the subject ⁴⁷⁹ matter, but the one has in fact sold more than he thought he was selling, and the other got more than he expected"—illustrating by sale of a leasehold having longer to run than supposed: *Okill v. Whittaker*, 1 De Gex & S. 83.

A further limitation upon the maxim, *Ignorantia facti excusat*, especially applicable to cases like the present, is that where parties have entered into contract based upon uncertain or contingent events, purposely, as a compromise of doubtful claims arising from them, in absence of any bad faith, no rescission can be had, though the facts turn out very differently from the expectation of either or both of the parties. In such classes of agreements the parties are presumed to calculate the chances, receive compensation therefor, and assume the risks: *Pomeroy's Equity Jurisprudence*, sec. 855; *Beach on Modern Equity Jurisprudence*, secs. 43, 56; *Continental Nat. Bank v. McGeoch*, 92 Wis. 286, 313. It is too obvious to require more than statement that, if parties fairly agree to abide uncertainty as to past or as to future events, they must do so: *Kercheval v. Doty*, 31 Wis. 476.

Applying the definitions and rules of law above set forth, with their qualifications, to the facts of this case, it is clearly apparent that if there was a mistake, in the sense in which that word is used in the law, the fact as to which such mistake existed was not an intrinsic one; it was not of the subject matter of the contract. There was no mistake or misunderstanding as to the acts of the defendant nor as to the injuries which the plaintiff had received. The effect of those injuries was, of course, problematical and conjectural. That very uncertainty entered into the compromise made, and was the consideration of a certain sum on one side and the surrender of any larger sum on the other. The elements of the contract of settlement were: 1. Whether defendant was liable; and 2. What amount, in view of all the contingencies, should be paid and received in satisfaction of such liability, and the question of the plaintiff's ⁴⁸⁰ condition, whether pregnant or not, was merely a collateral question. It was no part of the injury caused by defendant, nor anything for which damages should be paid. At most, it was but

one of the surrounding conditions which might or might not increase the effect of the injuries. It is probably true, in the great majority of personal injury cases, that the effect which the injuries received may have, as to time of disability, quantum of suffering, and the like, may be modified by the physical or mental condition of the injured party. For example, a predisposition to rheumatism would be a condition likely to enhance the subsequent effects of an injury, especially a dislocation or other injury to a joint. A disturbed condition of the system might prevent the reuniting of a broken bone, otherwise practically certain. A predisposition to nervous troubles might vastly multiply the effects of a slight spinal injury. So that if the mere ignorance of such surrounding conditions can suffice to render ineffective a settlement, because after events indicate that the amount paid is inadequate, few compromises of the damages from personal injury could be relied on. Compromise is highly favored by the law, and any rule or doctrine by which the fair meeting of the minds of the parties to that end, in the great majority of cases which arise in human affairs, must fail to be permanent or effectual to settle their rights, is contrary to the whole spirit of the law, and should not be adopted. The question in each such case is, Did the minds of the parties meet upon the understanding of the payment and acceptance of something in full settlement of defendant's liability? If they did, without fraud or unfair conduct on either side, the contract must stand, although subsequent events may show that either party made a bad bargain, because of a wrong estimate of the damages which would accrue: *Seeley v. Citizens' T. Co.*, 179 Pa. St. 334, 338; *Homuth v. Metropolitan St. Ry. Co.*, 129 Mo. 629; *Klauber v. Wright*, 52 Wis. 303, 314.

481 In the case at bar there can be no question but that the agreement reached was for full settlement of all defendant's liability for damages resulting from the accident. The written agreement unambiguously asserts such intention, and there is no claim that plaintiff did not so understand it. She might well enter on such compromise, for every advantage of knowledge as to the injuries received, and as to their probable effect, was with her. She had the benefit of her own observation, and the counsel of her customary physician, while defendant had but the opportunity of observing a single brief examination of her person, and that much less complete than was requested, in which its physician was necessarily subject to be deceived by simulated symptoms or exaggerated statements. In addition

to all which, the settlement cast upon the plaintiff a share of the contingencies of an underestimate of damages, while she assumed none in case an overestimate had been made. All charges for medical attendance by reason of her injuries were assumed by defendant, and it might with some reason claim that it should not pay those due to the miscarriage, since plaintiff gave the most vehement assurances against any such event. But both parties have treated this obligation as one to be performed by defendant, notwithstanding the unexpected enhancement thereof. On the other hand, no promptitude of recovery or overestimate of the injury was, by the agreement, to cause a return of any of the consideration paid.

It may be noted here that plaintiff nowhere suggests that she would not have made this settlement had she been aware of her pregnancy; and under this branch of the law of mistake it is laid down that it must clearly appear that the contract would not have been made had the fact been known. This is a material consideration. Enhancement of her damage was by no means certain to result from the fact of pregnancy. Indeed, the only evidence on the subject was against the probability of any such effect. We cannot say that she ⁴⁸² would not have been willing to accept this settlement and assume the contingency, even had she known the fact of her condition. And even if the fact were one intrinsic to the transaction, still it is essential to the extreme remedy of rescission of a deliberate contract that plaintiff prove clearly that she would not have executed had she known the truth: *Klauber v. Wright*, 52 Wis. 303; *Grymes v. Sanders*, 93 U. S. 55.

If, however, the fact of pregnancy had been one intrinsic to the contract, the question remains whether such mistake was made with reference thereto as avoids that contract. The court below finds that a mistake existed as to that fact. So far as this is a finding of fact, we shall accept it as conclusive in the light of the evidence; but whether it is such a mistake as justifies rescission of a deliberately executed agreement is a question of law, and present before us for decision. We have already pointed out the distinction between the "unconscious ignorance" required to accomplish this result and the mental state of consciousness of ignorance whether the fact exists or not, where, as Dixon, C. J., phrases it, her attention being called to the subject, she waived any investigation of it and elected to proceed without inquiry into it. It seems clear that the plaintiff was—indeed, that both parties were—in the latter mental condition.

The plaintiff had passed by about a week the proper period of her menstruation. She was a woman of intelligence and experience, already the mother of three children. She necessarily knew that the question of her condition was one of uncertainty. Her conclusion thereon, however firm, was necessarily but a conclusion from various facts, circumstances, and symptoms, some of which at least suggested existence, instead of nonexistence, of the suspected state. It was but a balancing of probabilities. The finding, indeed, is that the parties believed, not that they were ignorant; and plaintiff's own testimony makes it apparent that the situation was little more than a state of doubt, with ⁴⁸³ a belief that the probability was negative. She says: "I had bruises and was flowing. I was not positive I was pregnant. I told them I was not. The doctors went all over the case and made inquiries, and at last it was agreed, they were not sure I was in the family way, and they agreed that Dr. Golley should take care of me." In a case of doubt like this, if the doubtful fact is material, parties may compromise and include the uncertainty among those covered by the settlement; they may refuse to settle until the uncertainty is removed, or they may settle everything else and expressly omit therefrom the specified contingency. If they go on and make settlement in terms complete, they will be presumed to have intended the apparent effect of their acts. Any other presumption would be contrary to the truth in the great majority of instances, and defeat the real intention of the parties, and we have no doubt it would do so here. It seems to us that both parties had in mind the possibility of pregnancy, and yet that both intended what they said by their written agreement, namely, to pay and accept in compromise and discharge of all defendant's liability a present sum of money and payment for any medical attendance rendered necessary by the injuries. The defendant has performed that agreement on its part, and plaintiff must be held to abide it on hers.

Trial by jury having been waived except as to amount of damages, it is proper for this court to apply the law to the facts established in the court below. Those facts are that plaintiff, understandingly and without fraud, executed the release set forth, and that no such mistake of fact as warrants rescission of that contract appears. As a result, judgment should have gone for the defendant.

By the Court. The judgment is reversed and the cause remanded to the circuit court with directions to enter judgment for defendant.

A MISTAKE OF FACT CONSISTS in an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or belief in the present existence of a thing material to the contract which does not exist, or in the past existence of a thing which has not existed: See the extended note to *Miles v. Stevens*, 45 Am. Dec. 631.

MISTAKE, ELEMENTS OF.—In order to entitle a party to relief from a mistake, it is necessary that such mistake should have been in reference to a material fact in the transaction, and not as to a mere incidental circumstance, and, further, that such mistake should have determined the conduct of him by whom it was made: See monographic note to *Miles v. Stevens*, 45 Am. Dec. 632.

MISTAKE, WHEN NOT RELIEVED AGAINST.—If parties treat upon the basis that the fact which is the subject of the agreement is doubtful, and the consequent risk each is to encounter is taken into consideration in the stipulations assented to, the contract is valid notwithstanding any mistake of one of the parties: *Perkins v. Gay*, 3 Serg. & R. 327, 8 Am. Dec. 653. In the absence of inequitable conduct, equity will not relieve from the consequences of voluntary compromises or speculative contracts, when they turn out differently from what was anticipated: See extended note to *Miles v. Stevens*, 45 Am. Dec. 633, 634. On the general subject of relief from mistake, see the extended notes to *Williams v. Hamilton*, 65 Am. St. Rep. 486-497, and *Buffalo v. O'Malley*, 50 Am. Rep. 139-141.

IN RE DONGES' ESTATE.

[103 WISCONSIN, 497.]

WILLS.—IN CONSTRUING WILLS the dominating rule is, that the intention of the testator must be ascertained from the words thereof in the light of all surrounding circumstances, and, when ascertained, given effect.

WILLS—CONSTRUCTION OF.—A testator will be presumed to have intended the complete distribution of his estate, and a construction tending to that end is preferred to one resulting in partial intestacy.

WILLS—DEVISE OR BEQUEST BY IMPLICATION.—A gift by implication is presumed whenever the conclusion is inevitable that the testator so intended.

WILLS—GIFT BY IMPLICATION.—A devise to the testator's wife of all the real property of which he dies seised, to hold until the youngest of his children, should any be born to them, attains the age of twenty-one years, and, if there should be no children surviving at his decease, she to be the sole owner of such real estate, implies that, on the majority of his after-born children, such property shall vest in them.

WILLS—PROVISION FOR AFTER-BORN CHILDREN, WHAT IS.—A devise of property to the testator's wife to hold until the young-

est of his children reaches twenty-one years of age, should any be born to him, is, in contemplation of law, the making of a provision for his after-born children. Hence their rights must be determined by the will.

WILLS.—A PROVISION FOR AFTER-BORN CHILDREN depriving them of their rights as heirs of the testator and restricting them to his bounty as expressed in such will need not be a presently available provision for their support on his death, nor need it be absolute or such as the court deems adequate or satisfies its sense of justice.

COSTS.—THE RIGHT OF LITIGANTS TO COSTS IS WHOLLY STATUTORY, and for the court to allow or apportion costs it is necessary to point to some specific provision of the statute giving the right.

ESTATES OF DECEDENTS—COSTS, ALLOWANCE OF.—In cases for the probate or construction of wills the court is not, as to the allowance of taxable costs, controlled by the precise terms of the statute, but has discretion broad enough to permit it to allow or withhold such costs, or authorize their payment out of the estate.

ESTATES OF DECEDENTS—COSTS—COUNSEL FEES, ALLOWANCE OF AS.—An allowance may be made to an executor for his counsel fees incurred in the performance of his official duties, but where a litigation takes place between others respecting the admission to probate or the construction of a will, no allowance can be made in favor of any of them payable out of the estate, except for taxable costs. This does not include the fees of attorneys.

Petition by the children of Jacob Donges for the construction of his will executed in April, 1890. The terms of the devise in question appear from the opinion of the court. The will also declared that if there should be no children living at his decease, his wife should be the owner of his real estate, but that if she intermarried again, she should have only her dower. It contained a bequest in favor of the testator's sisters, to be paid within a year after his death, which bequest, it was proved, was but a mode of recognizing and paying an indebtedness existing from him to them. Three months after the making of the will a daughter was born to the testator, and a little more than three years thereafter another daughter. His widow elected to take under the law instead of under the will. The trial court decided that the will did not make any provision for the after-born children, and hence that they were entitled to take as if their father had died intestate. The sisters of the testator appealed.

Quarles, Spence & Quarles, for the appellants.

Winkler, Flanders, Smith, Bottum & Vilas, for the respondents.

300 **DODGE, J.** Section 2286 of the Revised Statutes of 1878 is, by its terms, to take effect and confer upon an after-

born child the share which he would have had in the event of intestacy when the parent, by his will, makes no provision for such child, unless it is also apparent by the will that he intended to make no provision for him. The first question is, therefore, whether or not provision is made for the two respondents, both born after the making of their father's will, at which time he had no children.

The comprehensive and all-dominating rule in construing wills is that the intention of the testator must be ascertained from the words thereof, in the light of all surrounding circumstances, and that intention be given effect. To accomplish this, multitudinous minor rules have been announced, more or less technical, which, however, serve not so much to restrict or constrain the judicial mind as simply to guide ⁵⁰¹ and to indicate probabilities in the absence of countervailing considerations. None of them are to be followed blindly if they lead to subversion of what was clearly the intention of the testator. Among these, two are relevant to the present consideration: 1. That in case of doubt such construction will be adopted as to support and give effect to the will, rather than to defeat it; 2. That a testator is presumed to have intended a complete distribution of his estate, and a construction tending to that end will be preferred to one which results in intestacy as to any part: *Mann v. Hyde*, 71 Mich. 278; *Given v. Hilton*, 95 U. S. 591, 594. In the carrying out of this latter rule courts often find themselves constrained to discover an intention to give, by the will, that which is not in fact given by express words, but which, it is clear from the other bequests and devises, it was the intention of the testator to give, as being so clearly implied from the gifts in fact made and the purpose of the will that silence can signify only an omission to state that which was in the testator's mind and intended. These are called "devises" or "bequests by implication." Mr. Schouler (*Schouler on Wills*, sec. 561) states the general rule: "A devise will be raised by implication under a will where the context requires it, and the devise is not in express terms"; and, after a few illustrations, sums up the subject as follows: "In short, a gift by implication may be presumed wherever the conclusion is irresistible that the testator so intended it."

The will before us contains this language: "I give and bequeath to my wife, Clara Donges, all the real estate of which I may die seised; to have and to hold the same until the youngest of my children, if any be born to me, shall attain the age of

twenty-one years. In case there are no children living at the time of my decease, my said wife shall be the sole owner of my real estate." The question arises at once, What was the intention of the testator as to his real estate if children were born to him and living at the time of ⁵⁰² his decease, after the youngest attained twenty-one years of age? Did he or did he not have any intention on the subject when he made his will? To answer this question we may be aided by an examination of the conclusions reached by courts in cases of greater or less similarity: *Peat v. Powell*, 1 Eden, 479; *Hale v. Beck*, 2 Eden, 229; *Atkinson v. Paice*, 1 Brown Ch. 91; *Goodright v. Hoskins*, 9 East, 306; *Ex parte Rogers*, 2 Madd. 449; *Tomkins v. Tomkins*, 1 Burr. 234; *Gardiner v. Stevens*, 30 L. J. Ch. 199; *Wilks v. Williams*, 2 Johns. & H. 125; *Tyson v. Blake*, 22 N. Y. 558; *Low v. Harmony*, 72 N. Y. 408; *In re Moore's Estate*, 152 N. Y. 602; *Ramsay v. De Remer*, 65 Hun, 212; *Robinson v. Greene*, 14 R. I. 181, 190; *Bentley v. Kaufman*, 12 Phila. 435; *Eldred v. Shaw*, 112 Mich. 237; *New England etc. Co. v. Pitkin*, 163 Mass. 506; *Baker v. McLeod*, 79 Wis. 534, 543.

Peat v. Powell, 1 Eden, 479: Gift was in trust for son till he attained twenty-one, and then trust should cease. The words, "and then to my son and his heirs," were interpolated by implication. *Hale v. Beck*, 2 Eden, 229: Gift in trust to pay interest to the plaintiff, an infant, until she came to the age of twenty-one years. Court implied a bequest to plaintiff absolutely after twenty-one. *Atkinson v. Paice*, 1 Brown Ch. 91: The bequest was "in trust to J. F. L. till he comes of age." Held, that absolute bequest after majority would be implied: *Goodright v. Hoskins*, 9 East, 306: Bequest to son Richard until his son Thomas attained the age of twenty-one years, and no longer; but, in case said Thomas die in minority, then remainder to others. Held, an implication of a bequest to Thomas upon his attaining majority. *Gardiner v. Stevens*, 30 L. J. Ch. 199: Property bequeathed in trust for A and B till B is twenty-five years old. In case of death of A and B before that time, then over to others. Court held an implication raised that A and B should take the remainder when B attained the age of twenty-five years. *Ex parte Rogers*, 2 Madd. 449: Bequest in trust for married niece A, to ⁵⁰³ pay her interest, independently of her husband, during her life, and upon her decease without issue to pay over to others. Held that, having children, they took the principal of the legacy by necessary implication. *Low v. Harmony*, 72 N. Y. 408: Bequest to A for life,

and, in case she die without issue, then to testator's other heirs. A bequest to her children, if she have any, raised by implication. In *re Moore's Estate*, 152 N. Y. 602: Estate for life to testator's two sons and the survivor. After the death of the two sons and their heirs, if they have any, bequest over to others. Court implied "heirs" to mean "heirs of the body," and that, being such, they took the fee. *Ramsay v. De Remer*, 65 Hun, 212: Bequest to granddaughter Nellie, and, in case she shall die without issue, then over to others. Bequest to issue raised by implication, the court saying: "While it is not expressly so stated in the will, the plain implication is that the testator intended the property in question should be held and enjoyed by the plaintiff and her issue. Where the intent can be clearly collected from the writing it is the duty of the court to give effect to that intent, provided no rule of law is thereby violated; and devises by implication will be upheld where no gift of the property is made in formal language." *Baker v. McLeod*, 79 Wis. 543: Bequest was of the whole estate in trust for an only daughter, an infant, to pay over rents and profits or principal as trustee should deem for the advantage of the daughter, and all the principal to be paid to her when she should attain the age of twenty-one years, and upon her death under the age of twenty-one years the estate was bequeathed to others. The court held that the plain intent of the testator justified the addition of the words "without issue" to the contingency of her death a minor, and that, she having died in her minority, but leaving issue, a bequest of the estate to such issue would be raised.

A careful reading of the whole will leads us irresistibly to the conclusion that the testator had in mind the intention ⁵⁰⁴ that upon the majority of the youngest of his after-born children the real estate, which meanwhile was devised to his widow, should pass to them, and that the failure to so declare was, as in the many cases above referred to, merely an omission to express an intention fully present in the mind of the testator. No other disposition is made and all the other contingencies, except the existence of such children after attaining the age of twenty-one years, are covered. The leaving of such estate, with the attention of the testator obviously turned to the probable existence of such children, and the presumed inclination to provide for them, when added to the purpose of the will in the light of certain extrinsic evidence as to the situation, leaves no doubt in our minds of this intention of the testator; and it is

our duty to declare and effectuate such intention in a case like this, and to supply the ellipsis or omission of the testator, so that there shall be added to the first paragraph of the will, "and then to my said children," and to hold that by the will itself the realty is devised to respondents upon the majority of the youngest.

The question next arises whether this devise to his two children of all of his real estate upon the arrival of the youngest at the age of twenty-one years is a "provision" for these after-born children, within the meaning of the statute. It is said this is not a present available provision for their support and maintenance from the time of his death, and it is perhaps contingent to the extent that it may be defeated by the death of both of said children before the youngest shall attain the age of twenty-one years. The authorities on this subject are not without conflict. In some states a bequest has been held not a provision within the meaning of the statute, because running only to a class, of which the after-born child became one, and in others it is held that the provision required by the statute must be an adequate or available one, and not postponed or reversionary; while in ⁵⁰⁵ other states a contrary view upon both of these propositions has been maintained. The first of these positions is supported by *Bowen v. Hoxie*, 137 Mass. 527; *Rhodes v. Weldy*, 46 Ohio St. 234, 15 Am. St. Rep. 584; *Hollockman v. Copeland*, 10 Ga. 79; *Waterman v. Hawkins*, 63 Me. 156; *Potter v. Brown*, 11 R. I. 232; *Willard's Estate*, 68 Pa. St. 327. It has little relevancy here. It rests on the very obvious ground that a donation to a class—like "my children" or "my heirs"—which in fact exists at the time of making the will indicates no thought in the mind of the testator of an after-born child, and justifies no conclusion that any provision was intended to be made for him. It constitutes no evidence that the parent did not entirely overlook the possibility of such child's existence. E converso to this class of cases are *Meares v. Meares*, 4 Ired. 192, and *Van Dusen's Estate*, 5 Pa. Dist. 234, where bequest to a class was held "provision" for the after-born, it being apparent that the father had in mind the possibility of future issue to take as part of such class. In the will before us, however, where the donation is expressly and unmistakably to the after-born children, no doubt can exist that the gift was intentional, and any forgetfulness or omission is, of course, excluded from possibility.

The second position, namely, that a mere contingent or future bequest or devise does not constitute a "provision," within the meaning of the statute, is much urged by the respondents, and is supported by the citation of many of the authorities above mentioned, as to which it may be noted generally that most of them are rested on both grounds; and it is difficult to discover that the courts would have held the provisions insufficient merely on the ground that the bequests were postponed or contingent.

In Hollingsworth's Appeal, 51 Pa. St. 521, however, the insufficiency of the donation was undoubtedly the sole ground of holding the statute not satisfied. In that case all the estate was given absolutely to the wife of the testator, who ⁵⁰⁶ was appointed guardian of the children during their minority, and they committed "entirely and fully to her affection, judgment, and discretion for their maintenance, education, and future provision, and which guardianship I intend and consider as a suitable and proper provision for such child or children." The testator had no children, but contemplated after-born, one of whom was born nine days after the date of the will. In Willard's Estate, 68 Pa. St. 327, while much weight is given to the fact that the only provision for the after-born child resulted from its becoming a member of a class, viz., "heirs at law," yet the court undoubtedly laid much stress on the fact that the bequest was reversionary only, it being of a remainder to his heirs in three thousand dollars upon the death of the testator's mother and in a seven thousand dollar homestead upon the death of the testator's widow; and the case is probably authority to the proposition that such a bequest is not a "provision," within the meaning of the Pennsylvania statute, for the reason that it does not "provide" for the needs of the children presently upon the death of their father, although the court does say: "The statute does not say fully or equally provided for. It may be true that, if it clearly appears by the terms of the will that an after-born child was within the special intention of the testator, if there was any provision, no matter how inadequate, the words of the statute would be satisfied." It must be borne in mind, however, that the Pennsylvania statute goes much further than ours, and has a different purpose, in that it attempts not only to make provision for children overlooked or unintentionally omitted by an ancestor, but restrains the power of a testator to disinherit children at all; and, such being the purpose and policy of the legislature, a very natural and proper

construction would import the word "reasonable" as a qualification of the word "provision." In *Waterman v. Hawkins*, 63 Me. 156, the decision is again very ambiguous as to whether the failure to provide was because the only ⁵⁰⁷ bequest of which the child could have any advantage was a general one "to my heirs," or because it was reversionary and contingent, being dependent upon the life or widowhood of testator's widow. Stress is laid upon both grounds, and it is the joining of the two which is held to leave the statute requiring provision for a child unsatisfied. The court said: "A child of a testator, born after his death, cannot, in any proper sense of the term, be deemed 'provided for in his will' by a general devise of a reversion to the heirs of the testator. There is nothing in such a provision to suggest that the child was thought of by the testator. The form of expression would indicate the contrary." In Maine, as in Pennsylvania, the statute restricts a testator from disinheriting his after-born children absolutely. In *Potter v. Brown*, 11 R. I. 232, the alleged provision for an after-born child was a bequest in trust for an existing daughter, to become hers absolutely on marriage or majority, with remainder over to her brothers and sisters then living in case of her death unmarried and a minor. The court rested its conclusion that no provision was made for the after-born child mainly upon the inadequate and contingent character of the bequest, but also on the general classification of the beneficiaries of that bequest, pointing out that it might include not only this after-born child of the testator, but also any children whom his widow might have by a subsequent husband, and upon both grounds held that there was no apparent intention in the testator to provide for the child in question. The statute in Rhode Island, like those before referred to, is restrictive of the testator's intention, and does not permit disinheritance of an after-born child.

The case of *Bowen v. Hoxie*, 137 Mass. 527, is strongly pressed by respondents, and is quite uniformly cited as sustaining both of the foregoing propositions. There the testator, after making bequests to his wife and living children, left the sum of fifty thousand dollars in trust, income to his wife during ⁵⁰⁸ life, and on her death to surviving children by her. The court pointed out first that the provision, if any, to the after-born child was a wholly unintentional one, saying: "The most that can be said is that the provision for a class happens to be broad enough to include her"; and then proceeded to point out its insufficiency, in that it was not a present pro-

vision, but might fall in only after a long lapse of time, saying: "She might live long, marry, have children, and die, without ever coming into the enjoyment of her share or interest, to which, as one of a class, she might be entitled"; and upon these grounds held that it did not constitute a provision within the meaning of the Massachusetts statute, which, like those above mentioned, gave an intestate's share absolutely, if no provision was made, without recognizing the testator's right to intentionally withhold such provision. This case, however, has been construed by the supreme court of Massachusetts in *In re Minot*, 164 Mass. 38, whereby it is limited to the one ground, viz., that the bequest to the after-born child was unintentional, and it is said that its reversionary character would not have destroyed its effect as a provision. In that case the whole of the property was given to a trustee, income to the testator's widow during life, and reversion to those who would then be his heirs at law by blood. At the time of the making of the will he had no children, but his wife was pregnant, and the court held that by the expression "heirs at law by blood" he had in mind and intended after-born children, and that, so construed, it constituted a provision.

In *Rhodes v. Weldy*, 46 Ohio St. 234, 15 Am. St. Rep. 584, an after-born child was held not provided for by devise to the widow of all real estate for her life, and after her death to the heirs of her body begotten, and, in the event of her death without issue, over to collateral kindred. The grounds of the decision were complex, and involved the consideration that the child could have the benefit only by the accident of ⁵⁰⁹ her becoming a member of a class. "It was intended as a comprehensive direction of the course which the property should take after the immediate object of the testator's bounty should die." The court said it was wholly immaterial whether the interest of the child was contingent or vested, and, after referring to the authorities above reviewed, added to the ground above stated the consideration that it was not a present or available provision for her. The statute in Ohio, while different from our own, yet does reserve to the testator power to disinherit by making his intention so to do apparent by the will.

In Michigan, where we find our statute in exact words, in *Stebbins v. Stebbins*, 94 Mich. 304, 34 Am. St. Rep. 345, construing a statute corresponding to our section 2287, the court held that a mere donation to the issue of a deceased child of a family Bible and a privilege to select certain ornaments and clothing

as mementoes was not intended as a provision, and, it appearing as a fact that the omission to make other provision for her was by accident and unintentional, enforced the statute in her favor. The court said: "It would undoubtedly be true that she would be concluded by the terms of the will itself if the testator had made some provision for her of a substantial character, however insignificant it might be in amount, but which showed that he intended it as a provision, and not as a keepsake merely." In *Forbes v. Darling*, 94 Mich. 621, a bequest of all property to the widow, with binding directions to provide for the maintenance and education of children during minority, was held to be a provision for them; although the court also held that the degree and quality of maintenance and education furnished could not be inquired into.

In Illinois the statute is, in general policy, like ours, reserving the testator's power to disinherit if he so intends, but providing against unintentional omission. In *Osborn v. Jefferson Nat. Bank*, 116 Ill. 130, the court construed a will devising all property to the testatrix's husband if he survived her, and ⁵¹⁰ if he did not survive her and she should die leaving a child or children, then to her children. The husband did survive. The court said: "As to the provision for the after-born children, the statute is silent as to its extent, or whether it shall be reasonable or not, or as to when it shall commence or when terminate; but by its plain, unambiguous meaning it applies only to children for whom no provision is made by the will. If any provision is made for them, then they do not come within the purview of the statute. The testatrix was to be the sole judge of what this provision should be, and that the same was not to be left for the determination of the courts is manifest by the second clause of the section, which authorizes the disinheritance of such child or children altogether." And it was held that whether the will made a provision or not, it made perfectly plain that the testatrix had after-born children in mind, and that her intention was that they should have no other provision than that so made for them. Other authorities bearing not so directly on the subject are *Rhoton v. Blevin*, 99 Cal. 645; *Hockensmith v. Slusher*, 26 Mo. 237; *McCourtney v. Mathes*, 47 Mo. 533.

In Wisconsin the question has never been decided. It was raised in the case of *Verrinder v. Winter*, 98 Wis. 287, but expressly left unanswered. The same word used in section 2171 of the Revised Statutes of 1878, which puts a widow to her elec-

tion in case any provision is made for her, has been construed more than once (*Van Steenwyck v. Washburn*, 59 Wis. 483, 48 Am. Rep. 532; *Turner v. Scheiber*, 89 Wis. 1; *Melms v. Pabst Beer Co.*, 93 Wis. 140), the general result of which is to give the word an exact literal meaning, and to hold that the giving to the widow anything in form is a "provision," within that statute, whether it be hers in possession or whether it be valuable. Thus, in *Van Steenwyck v. Washburn*, 59 Wis. 483, 48 Am. Rep. 532, nothing whatever was given the widow, but estate placed in the hands of trustees with direction to expend whatever might be necessary to provide ⁵¹¹ for her comfort and physical health. This was held a "provision," and the same view taken in Minnesota: *Washburn v. Van Steenwyk*, 32 Minn. 336. In *Turner v. Scheiber*, 89 Wis. 1, a devise to trustees, binding them to support the testator's widow during her life, was held to be a provision. And in *Melms v. Pabst Beer Co.*, 93 Wis. 140, a bequest to her of all property charged with the payment of debts which would more than consume it all, was so held.

Considering our own statute untrammelled by the variant decisions of other courts, it must be borne in mind that the legislative purpose was not to restrict the parent, nor to dictate to him what provision he should make. It was not to control his intention, but to provide for after-born children in the not improbable event of forgetfulness or oversight of the parent, upon the very presumption, indeed, that if he had thought of them he would have intended that they should have some share in his estate, and that share the law would then fix. The power of the testator to decide whether anything, and if so how much and in what form, should be given to after-born children, is as uncontrolled as if there were no statute on the subject. And if it be apparent that he was not forgetful—that he had the after-born child in mind, and satisfied the statute by making for it some provision—we do not conceive it the purpose of the statute nor the province of the court to say that such will shall not govern, but that he not only must make some provision, as the statute requires, but must make provision adequate in the opinion of the court, or provision in any particular form. Such holding seems to us to import into the statute words and purpose not necessarily there, and would infringe upon the freedom of will in disposing of property and regulating estates. It is not apparent why it should not be as much in the power of the testator to place a child, born after the making of his

will, in a state of dependency on the mother, as it confessedly is to do so with the child in existence when ⁵¹² the will was made. The perils to the child in each case are the same, and the reasons justifying or failing to justify interference by the legislature with the parent's wishes on the subject do not vary in one case from the other: *Hawhe v. Chicago etc. R. R. Co.*, 165 Ill. 561; *McCourtney v. Mathes*, 47 Mo. 533; *Leonard v. Enochs*, 92 Ky. 186; *Rhoton v. Blevin*, 99 Cal. 645.

An analysis of all the authorities cited to us, or which have come under our notice, leaves without support the contention that, under a statute like ours, whose purpose is, not to constrain but only to supplement a testator's intention, the provision required to prevent intestacy as to an after-born child must be of a quality or value to satisfy a court's sense of justice, except in Ohio, and that support is ambiguous at the best. On the other hand, the courts of Michigan, Illinois, and Massachusetts clearly, and Missouri, Kentucky, and California apparently, sustain the other rule that any provision, intended as such, however slight, will be respected and enforced as the complete will of the testator. That view also is in accord with the tendency of our own decisions as to the provision which will be effective to cut off a widow's dower, and we think is supported by the better reason. We accordingly hold that the devise made by this will of a remainder in the real estate to the respondents upon the majority of the youngest constitutes a "provision" for them, within the terms of section 2286, and that the estate should be assigned and distributed according to the terms of the will, subject to such modification as results from the widow's election to take by law, and not under the will.

Independently of our view as to the sufficiency of this devise, still, we having decided that a devise is made, the same conclusion must be reached upon the same reasoning applied in *Verrinder v. Winter*, 98 Wis. 287, namely, that it appears from the will that such, and no other, donation was intended, and, if that is not a provision, none was intended.

⁵¹³ It is urged that costs of both parties in all courts should be ordered paid out of the estate, and that the county court should be directed to make an allowance for counsel fees to the respective parties, also to be paid out of the estate. This question resolves itself into two very distinct parts, although in practical application they have been greatly confused. The first is the allowance of costs proper, that is, taxable costs;

second, the allowance of counsel fees or other expenses of litigation incurred by the antagonistic parties, and not included within the statutory fee bill.

As to the first of these, the right and liability of litigants to costs and the amount thereof is wholly statutory: In re Carroll's Will, 53 Wis. 228; Estate of Cole, 102 Wis. 1, 72 Am. St. Rep. 854. For the court to allow or apportion costs, it is necessary to point to the specific provision of statute giving authority. As to costs in this court, the allowance of them, in cases for the probate or construction of wills, otherwise than in ordinary litigation, finds inception in the Jackman Will Case, 26 Wis. 364, a contested will case. It was there pointed out that section 36, chapter 264, of the Laws of 1860, now substantially embodied in section 2949 of the Statutes of 1898, did not expressly allow any variation from the allowance of costs to the successful party and against the unsuccessful. But it was construed as intending to leave to this court a discretion broad enough to apportion those costs in such a case as there under consideration. And while that view, in the light of the general proposition above announced, savored somewhat of laxity, yet it has never been departed from, and has never received disapproval from the legislature, notwithstanding the two revisions since, and we think has become a settled construction of section 2949, and that, as a result thereof, in such cases as there and now presented a discretion rests under the statute with this court to allow or withhold costs, or to authorize their payment out of the estate, which amounts to the same thing as allowing them against the executor, and ⁵¹⁴ permitting him to be reimbursed from the estate. In pursuance of this view it was said in Jones v. Roberts, 96 Wis. 427, 433, speaking of costs in this court: "The established rule is, where the contestant of a will has acted in good faith, and questions of law or fact are worthy of consideration, costs taxed against him should be paid out of the estate." In the light of such uniform holding, upon due consideration, we do not deem it proper at this day to depart from that established rule of practice; and as the contest before us was entirely justifiable and presented questions of law worthy of consideration, we think it proper that the taxable costs of both parties in this court should be paid out of the estate.

With reference to the circuit court, the costs must be governed by section 2918, which vests discretion in that court as to who shall recover costs, and as to whether the recovery

shall be of the whole or only part of (but not more than) those taxable under the fee bill (*In re Carroll's Will*, 53 Wis. 228); which discretion, however, is controlled in some measure by section 2932, requiring that any costs taxed against the executor shall be collected out of the estate unless the court shall direct them to be paid by him personally for mismanagement or bad faith.

In the county court taxable costs are controlled by section 4041, in applying which the county court is in some measure restrained by section 2932, which applies to all courts: *Estate of Cole*, 102 Wis. 1, 72 Am. St. Rep. 854. The discretion thus vested in the circuit and county courts under the statutes above mentioned we shall not attempt to direct in advance, though it might be subject to review if abused.

The question of allowance out of the estate or from one party to another of expenses not taxable by statute, such as general counsel fees and the like, is a very different one. The allowance of such expenses at all out of an estate first appears to have been considered by this court in the case of ⁵¹⁵ *Heiss v. Murphey*, 43 Wis. 45, which was one for the construction of a will. In the circuit court an allowance was made to the executor of three hundred dollars for his counsel fees, from which the beneficiaries under the will appealed. The allowance was sustained on the ground stated by Ryan, C. J., that by the general rules of courts of equity an executor may always in a proper case take the opinion of the court upon the will at the expense of the estate. The reason is, of course, obvious. It may be as essential to find out what the will means, in order to carry it out, as to take any other step or do any other act involving expense, and the expense of so doing is just as properly incurred in the performance of the executor's official duty in the one case as in the other. This is equally true as to trustees of any sort having duties to perform under the direction of a court. It bears no relation to the allowance of costs between litigants. This point of view was emphasized in the case (decided at about the same time) of *In re Kirkendall's Estate*, 43 Wis. 167, 177, where costs out of the estate were refused to opposing claimants, the executor being no party to the controversy. The question here under consideration goes further, and includes allowance of expenses of others than the executor, and is embarrassed by the fact that commencing with *Scott v. West*, 63 Wis. 529, and following through a considerable list of cases, this court has, without apparent discussion

and without indicating any authority therefor, entered an order in suits for the construction of wills, "that the county court make allowance out of the estate to the respective parties for counsel fees." Substantially this order appears in *Webster v. Morris*, 66 Wis. 366, 400, 57 Am. Rep. 278; *Ford v. Ford*, 70 Wis. 19, 68, 5 Am. St. Rep. 117; *Burnham v. Burnham*, 79 Wis. 557; *Beurhaus v. Cole*, 94 Wis. 617, 631, and perhaps some other cases. It is believed that such order has frequently been made by reason of either express or tacit consent of opposing parties, and we do not discover that in any of these cases there has been ⁵¹⁶ opposition raised thereto. The action of the court in that respect differs radically in character from the mere act of construing a costs statute having reference only to practice and procedure. The act of requiring one party to pay considerable sums of money for expenses incurred by another in litigation involves more than practice or procedure. Unless the authority for it exists in the law, so that by joining in litigation parties subject themselves to such obligation, it trenches closely upon that forbidden act of depriving one of his property without due process of law, or taking property from one for the private benefit of another.

The general subject was recently discussed in *Estate of Cole*, 102 Wis. 1, 72 Am. St. Rep. 854, where it was said, in a litigation as to a trust estate: "There is no statute authorizing such a proceeding, and no precedent for it in this court. It is considered that counsel fees to others than the trustee who may be interested in the trust fund are not recoverable, either from the trustee personally or out of such fund. That was the rule in chancery before the code, and there is no statute changing it, nor any precedent varying the old practice." Exception was there made for the one case, not there presented, of the construction of a will, embarrassed by the precedents above referred to, but which, except for such precedents, is governed by the same reasons, and should be subject to the same rules, as the proceeding presented in *Estate of Cole*, 102 Wis. 1, 72 Am. St. Rep. 854.

The confusion of counsel fee allowances with costs is not peculiar to Wisconsin, but appears in many states. Probably it results from the practice of the English court of chancery to allow such an item sometimes as part of the costs, under the designation of "costs taxed as between solicitor and client"; but even there such item was really distinct in kind from the regular fee bill, and was allowed only in extreme cases

by virtue of the statute of 17 Richard II, chapter 6, authorizing the chancellor to "allow damages according to his discretion ⁵¹⁷ to him which is troubled unduly." That statute obviously gave the broadest power to make impositions upon a litigant. Whether or not it became part of the common law, which immigrated to this country with the colonists, it is wholly superseded by the costs statutes, certainly in the code states: *Downing v. Marshall*, 37 N. Y. 380; *In re Carroll's Will*, 53 Wis. 228, where it was urged and denied effect to authorize such allowances.

Since, then, such allowances are not supported by any statute, how can they be justified? No good reason is apparent why the expenses of a litigant as to his ownership of property should receive the attention of the court or be paid by another when the litigation takes the form of construing a will, any more than if the same issue were tried in ejectment or replevin; but no one would contend that in the latter case any power to make such order existed in the court. Where parties are *sui juris*, and each litigating for the promotion of his own interests, each should bear the expense, as he will enjoy the fruits of his own contention; and the existence of a fund over which the court has control in no degree varies the principle involved or justifies infraction thereof. On mature consideration we are convinced that the habit of ordering payment of counsel fees, other than the executor's, is without authority of law and should not longer be indulged in, but that the cases and extent in which one party or any fund shall be required to contribute to the expenses of another in litigation must be limited by the costs statutes.

It will, of course, be understood that what we have said with reference to allowance of counsel fees, etc., has no application whatever to those reasonably incurred by an executor or any other trustee in the good faith performance of his duties. No rule is better settled than that the trustee is entitled to pay those, as all other proper expenses which fall on him by reason of his trust, out of the trust funds in his ⁵¹⁸ hands, and that when he comes to settle his accounts such payments will be allowed him as credits if, in the opinion of the court, they are proper in character and reasonable in amount. In suits for construction of wills it is proper for the executor, whether plaintiff or defendant, to employ counsel, to the end that the questions of law involved may be properly brought before the court. Whether he should employ counsel to present

in the spirit of advocacy one or other or both of the antagonistic interests which may be involved by the construction, will often be a question of difficulty. Too often the counsel employed by the executors are in practical effect the ardent advocates of one side of a controversy between individual interests, in which the executor, as such, should have no choice. Obviously, such advocacy should not be compensated out of the common fund if its opposition is not to be also, and courts should be cautious in allowing for services ostensibly rendered to executors, but in spirit and effect rendered to one of the opposing interests, which should bear its own expenses. The field of discretion in controlling and approving conduct of executors and trustees is a broad one, however, and the court in each case must be guided by the conditions and circumstances there present. In the case at bar, in this court at least, the services of counsel on both sides have been rendered, not to the executors, but to the respective claimants upon this estate, who should each bear the expense therefor which he has incurred.

By the Court. Judgment reversed and cause remanded to the county court, with directions to enter judgment in accordance with this opinion upon respondents' petition. Taxable costs of both parties in this court will be paid out of the estate.

WILLS.—IN CONSTRUING WILLS, the intention of the testator must control: *Wescott v. Binford*, 104 Iowa, 645, 65 Am. St. Rep. 530. In order to ascertain what that intention is, the whole will and all its parts must be considered: *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135; and the circumstances under which the will was made should be looked to: *Elliott v. Elliott*, 117 Ind. 380, 10 Am. St. Rep. 54.

WILLS—PARTIAL INTESTACY.—The presumption is, that the testator intended to dispose of his entire estate and not to die partially intestate: *Succession of Allen*, 48 La. Ann. 1036, 55 Am. St. Rep. 295, and note.

WILLS—AFTER-BORN CHILDREN.—A devise by a testator of his real estate to his wife for life, and after her death to the heirs of her body begotten, is not a provision in the will for a child born to him after its execution: *Rhodes v. Weldy*, 46 Ohio St. 234, 15 Am. St. Rep. 584. On the rights of after-born and pretermitted children, see *Carpenter v. Snow*, 117 Mich. 489, 72 Am. St. Rep. 576, and the extended notes to *Rhodes v. Weldy*, 15 Am. St. Rep. 592-595, and *Wilson v. Fosket*, 39 Am. Dec. 740-744.

WILLS—PRETERMITTED HEIRS.—The omission to provide for an heir in a will may be shown to be unintentional either by the terms of the will or by extrinsic parol evidence: *Estate of Stebbins*, 94 Mich. 304, 34 Am. St. Rep. 345. An heir at law can be disinherited only by an express devise or by necessary implication: *Estate of Jacobs*, 140 Pa. St. 268, 23 Am. St. Rep. 230.

WILLS.—COSTS of both parties may be charged upon an estate if there was probable cause for contesting the validity of a will: *Clapp v.*

Fullerton, 34 N. Y. 190, 90 Am. Dec. 681. See, also, Meeker v. Meeker, 74 Iowa, 352, 7 Am. St. Rep. 489; Moore v. Alden, 80 Me. 301, 6 Am. St. Rep. 203; Cheever v. North, 106 Mich. 390, 58 Am. St. Rep. 499, and note.

WILLIAMS v. DAUBNER.

[108 WISCONSIN, 521.]

DEEDS—DELIVERY.—If a grantor executes a deed and delivers it to a person other than the grantee to hold, upon the understanding that if she recovers from her present sickness she is to have the deed back, and if not it is to be delivered to the grantee named, and such depositary retains the deed until the grantor's death, there has not been, and thereafter cannot be, a valid delivery to the grantee, and such deed is a nullity.

DEEDS—DELIVERY.—If the delivery of a deed is not absolute, or unconditional so as to be beyond the grantor's control, the depositary being a mere agent, and the instrument revocable at any time before the grantor's death, there is no valid delivery thereof to the grantee and the deed is a nullity.

W. J. and J. H. Turner, for the appellant.

Fiebing & Killilea, for the respondents.

522 BARDEEN, J. The facts in this case are in no substantial dispute. Mrs. Williams executed the deed in suit and delivered it to Mr. Daubner to hold, upon the understanding that if she recovered from her sickness she was to have it back, and, if not, then it was to be delivered to the grantee named. The sole question is, Was this deed in the hands of Daubner beyond her control? This case is ruled by *Pruitsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592. The cases do not differ in any essential particular as to the circumstances under which the deed came to the possession of the depositary and under which he was to hold it. It is true that in that case the depositary testified that the papers were under the grantor's control until he died, but that was merely his conclusion **523** from the facts stated, and did not give any additional weight thereto. In determining that the facts stated did not constitute a valid delivery of the deed, Chief Justice Dixon says: "An essential characteristic and indispensable feature of every delivery, whether absolute or conditional, is that there must be a parting with the possession and of the power and control over the deed by the grantor for the benefit of the grantee at the time of the deliv-

ery." The importance of these essentials has been recognized and enforced in this court in the following cases: *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427; *Schmidt v. Deegan*, 69 Wis. 300; *Albright v. Albright*, 70 Wis. 529; *Lehigh etc. Co. v. West Superior etc. Co.*, 91 Wis. 221. As sustaining the doctrine of *Prutsman v. Baker*, 30 Wis. 664, 11 Am. Rep. 592, and in addition to the cases therein cited, we refer to the following: *Baker v. Haskell*, 47 N. H. 479, 93 Am. Dec. 455; *Williams v. Schatz*, 42 Ohio St. 47; *Porter v. Woodhouse*, 59 Conn. 569, 21 Am. St. Rep. 131. The principle emphasized is that the delivery of the deed not being absolute, or conditional so as to be beyond the grantor's control, and the depositary being a mere agent, the instrument is revocable at any time before the grantor's death, and is therefore a nullity.

The principles stated seem to fully cover the case at bar, and render extended discussion unnecessary. Under the circumstances in proof, and within the authorities cited, we cannot escape the conclusion that the deed in the hands of Daubner was under the control of the grantor up to the time of her death, and therefore no legal delivery thereof has or can be made.

By the Court. The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded with directions to enter judgment for the plaintiff for the relief demanded in the complaint.

DEEDS—DELIVERY AFTER DEATH.—If a grantor executes a deed and places it in the hands of a third party to be held and delivered to the grantee after the grantor's death, reserving to himself no control over, nor right to recall or revoke it, these facts constitute a valid delivery: *Shea v. Murphy*, 164 Ill. 614, 56 Am. St. Rep. 215. But if the grantor does, either by himself or his agent, retain any control over the deed, or reserve any right to recall it, or to alter any of its provisions, the delivery is not good and the deed conveys no title: Monographic notes to *Brown v. Westerfield*, 53 Am. St. Rep. 554; *Welborn v. Weaver*, 63 Am. Dec. 243-245; and see, too, *Wilson v. Carrico*, 140 Ind. 533, 49 Am. St. Rep. 213, and extended note on conveyances to take effect after the grantor's death.

PRIEWÉ v. WISCONSIN STATE LAND AND IMPROVEMENT COMPANY.

[103 WISCONSIN, 537.]

STARE DECISIS—SUBSEQUENT APPEAL.—If a case has been before the supreme court on an appeal involving the sufficiency of the complaint therein, the decision then made is binding, on a subsequent appeal, as to all questions covered by the former decision, leaving nothing which can be questioned except whether the facts then said to constitute a sufficient cause for equitable relief have been found to exist by the trial court, and whether any material part of such findings is against the clear preponderance of the evidence.

WATERS AND WATERCOURSES—NAVIGABLE WATERS AND LANDS THEREUNDER—TITLE TO.—The navigable waters of the state and the lands thereunder belong to the state in all situations, so far as necessary to preserve inviolate the common-law right to enjoy those incidents which were not the subject of private ownership in navigable waters at the common law, and the legislature must preserve such right for the benefit of all of the people of the state.

WATERS AND WATERCOURSES—NAVIGABLE WATERS—INJUNCTION TO RESTRAIN INTERFERENCE WITH PUBLIC RIGHTS IN.—Any attempt by any person or corporation to violate public rights in the navigable waters of the state to the special injury of a particular person may be restrained by a private suit.

WATERS AND WATERCOURSES—NAVIGABLE LAKES AND LAND THEREUNDER.—Submerged land of navigable lakes cannot, by legislative enactment, in the furtherance of private interests, be made the subject of private ownership, and the state is powerless to divest itself of its title and trusteeship of such lands under the guise of promoting the public health, but in fact in the furtherance of private interests.

ESTOPPEL IN PAIS requires, as to the person against whom it is claimed, opportunity to speak, duty to speak, failure to speak, and reliance in good faith upon such failure.

ESTOPPEL AS TO LAND.—FAILURE OF RIPARIAN PROPRIETORS to begin action to restrain a corporation from draining a navigable lake under a statute ostensibly enacted to promote the public health, but in fact to further private interests, until a large sum of money has been expended by the corporation, does not preclude them from obtaining relief by injunction, if their action is commenced seasonably after actual damage to their property, and if before any considerable expense had been incurred there had been a decision by the supreme court of the state that submerged lands of navigable lakes could not, by statute, in the furtherance of private interests be made the subject of private ownership.

Action by a riparian owner to prevent the carrying out of a scheme for draining Muskego lake, a navigable body of water, to recover damages caused by a partial drainage of such lake, and to compel a restoration of the water to the condition in

which defendant found it. In 1891 a statute was enacted authorizing J. Reynolds, his heirs and assigns, to complete the drainage of the lake, ostensibly to promote the public health, and, in consideration thereof, all of the land within the meander line of the lake was to be conveyed to him. Reynolds caused a corporation to be formed, to which he conveyed his granted rights and privileges, in consideration of substantially all the stock of the corporation. Prior to the commencement of this action such corporation so far progressed with the drainage of the lake as to materially reduce the water therein, to the damage of plaintiff, and it proposed going on with the work to completion. The object of this action was to recover compensation for the damages caused plaintiff by taking the water of the lake from his land, and to obtain a mandatory injunction compelling the defendant to restore the lake to the condition existing before its operations commenced. A demurrer to the complaint was overruled on the ground that it contained sufficient allegations of fact to show that the purpose of the statute of 1891 was not to promote the public health, but to convert the bed of the lake into private ownership. Judgment for the plaintiff and defendant appealed.

H. Ryan and T. M. Kearney, for the appellant.

O. T. and G. L. Williams, for the respondent.

548 *MARSHALL, J.* There are no questions of law to be considered on this appeal. When the case was here before on an appeal involving the sufficiency of the complaint (*Priewe v. Wisconsin etc. Imp. Co.*, 93 Wis. 534), it was decided: 1. That on the facts alleged the operations under the act of 1887 did not affect plaintiff's riparian rights, as they left him with the privilege of passing over the uncovered lands between the original and new shore lines to the navigable waters of the lake; 2. That the act of 1891 was intended solely to convert the bed of the lake from public to private ownership in the guise of a pretended public purpose, that of promoting the public health; 3. That whether the ostensible public purpose of the act was the actual purpose is not concluded by its recitals, but may be inquired into and determined by the court as a question of fact, and the act sustained or condemned according to the finding; and 4. That the state is powerless to divest itself of its trusteeship as to the submerged lands under navigable waters in

this state under the guise ⁵⁴⁹ of promoting the public health. That decision is binding for the purpose of this appeal on all questions covered by it. It stands as the infallible truth, leaving nothing which can now be questioned, except whether the facts which were then said to constitute a sufficient cause for equitable relief have been found to exist by the trial court, and whether any material part of such findings is against the clear preponderance of the evidence: *Lathrop v. Knapp*, 27 Wis. 214; 37 Wis. 307; *Case v. Hoffman*, 100 Wis. 314.

Appellant's counsel has furnished us with the result of much research as regards the scope of the police power of the state and the supreme authority of the legislature to exercise such power, all of which is interesting but not material, because the subject is not before us. That the legislature has a broad discretion in the exercise of police powers cannot be questioned. Within that discretion its dominion is supreme; but whether a legislative enactment was designed to further some governmental function, or to further private gain, as said in the former opinion, is a judicial question, and counsel have failed to produce any authority to the contrary; and, even if such authority were produced, it could not change the rule for the purposes of this case. Not only, as indicated, is it a judicial question of fact which is presented by the controversy as to the purpose of the act of 1891, but the court is not concluded by the wording of the act as to where the truth lies. Otherwise private property rights could easily be taken away from one, and with or without consideration vested in another, under the guise of the promotion of some public purpose falsely recited in a legislative enactment.

Leaving out of view the pretense that the draining of the lake was for the purpose of promoting the public health, not a shadow of legal authority exists to justify the acts complained of. The legislature has no more authority to emancipate itself from the obligation resting upon it which was ⁵⁵⁰ assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose. It is supposed that this doctrine has been so firmly rooted in our jurisprudence as to be safe from any assault that can be made upon it. The navigable waters of the state belong to the state, and the lands under them, in all situations, so far as are necessary to preserve inviolate the common right to enjoy those incidents which were not

the subject of private ownership in navigable waters at common law; and any attempt by any person or corporation to violate such public rights to the special injury of a particular person, as when an attempt is made to take from such person some incident of his title to the shore of navigable waters, may be restrained by a private action. The general character of the state's title to submerged lands under navigable waters has been treated so fully several times within the past few years that there is nothing more that can be profitably said, even if the subject were open to discussion and decision in this case. Therefore we leave it by referring to such prior decisions: *Priewe v. Wisconsin etc. Co.*, 93 Wis. 534; *Willow River Club v. Wade*, 100 Wis. 86; *Mendota Club v. Anderson*, 101 Wis. 479; *Pewaukee v. Savoy*, 103 Wis. 271, ante, p. 859.

The only real controversy open for our consideration is, Are the findings of fact made by the trial court supported by the evidence? That must be answered in the affirmative, and without the answer being accompanied by any extended discussion of the evidence. The record is very long, covering some three hundred and fifty-five pages, all of which has been examined with that care necessary to a careful judicial determination of the question. The evidence is conflicting upon many of the material facts, but there is abundance of evidence in the record to the effect that the lake was a navigable body of water ⁵⁵¹ after the first drainage, in places, up to within fifty feet of the original shore line of plaintiff's property; that none of the lake bed was uncovered except a strip averaging about one hundred feet wide inside the shore line; that aside from that the entire lake bed was covered with water, and during most of the open season of the year it could be traversed by boats for the purposes of fishing and hunting; that such condition was destroyed by the second drainage to the damage of plaintiff; that a restoration of the lake to the condition it was in prior to such second drainage will promote the public health, and that the primary purpose of the act of 1891, under the authority of which such second drainage was made and defendant claims title to the lake bed, was to convert that which was public and held by the state without power of alienation into that which was private—a manifest excess of constitutional legislative authority.

A contention is made that plaintiff's omission to commence his action till a large amount of money had been expended by defendant under the act of 1891 should be held to preclude him from obtaining equitable relief; that by his silence defend-

ant was permitted to go on and incur expense on the faith of its legislative authority and the acquiescence of plaintiff, and that he should not now be allowed to change his position to the prejudice of the defendant. We are unable to see wherein the attitude of plaintiff misled the defendant in the slightest degree. Its reliance was wholly on the legislative enactment of 1891. There was no benefit which accrued to plaintiff by the second drainage of the lake, but, on the contrary, it was a serious damage to his property. Seasonably after actual damage to such property commenced, this action was instituted. The court found as a fact that the purpose of defendant's operations was solely to acquire the title to the lake bed, and that its grantor procured the passing of the law of 1891 for that purpose; and it further appears that before it incurred any considerable expense ⁵⁵² there was a decision by this court to the effect that submerged land of navigable lakes cannot, by legislative enactment, in the furtherance of private interests, be made the subject of private ownership: *McLennan v. Prentice*, 85 Wis. 427. So we have a case where defendant, in furtherance of a scheme which its officers and agents knew, or ought to have known, had been in principle condemned by this court, proceeded to a point in its operations where actual special damage accrued to the plaintiff, whereupon he, with reasonable diligence, commenced an action to restrain the further prosecution of the work. If there is any element of equitable estoppel in that situation we are unable to discover it. One of the first essentials to an equitable estoppel is that the party claiming the benefit of it must proceed in good faith. Here defendant purposed to obtain title to the lands from the state, which it knew, or if it did not know was negligent in not knowing, the state was powerless to subject to private ownership. Another essential of equitable estoppel is that the attitude of the person against whom it is claimed must have materially influenced the conduct of his adversary, or such person must be so circumstanced as to reap some benefit from such conduct. Here, as indicated, neither of these elements exists. There was no blowing hot and blowing cold alternately, no proceeding in good faith relying upon acquiescence because of the silence of plaintiff, with the circumstance of gain to plaintiff as an explanation of such silence. An equitable estoppel in pais requires, as to the person against whom the estoppel is claimed, opportunity to speak, duty to speak, failure to speak, and reliance in good faith upon such

failure. Here, at best, none of such elements existed except opportunity to speak.

A literal interpretation of the judgment would render it unnecessarily harsh. It would require a large expenditure of money without any resulting benefit to plaintiff. It may easily be read to require defendant to fill up all the excavations ⁵⁵³ made in the course of its operations under the act of 1891 between Wind lake and Muskego lake, and in the bed of the latter lake. We assume that it was only intended by the judgment to require such filling up of excavations as will restore the natural condition of the water in Muskego lake, as it would exist had there been no attempt to drain the lake under the act of 1891; that so much of the canal between Wind lake and Muskego lake and the canal in Muskego lake must be filled up as will accomplish that result. Such is probably what was in the judicial mind, and the judgment may reasonably be read that way. As so understood it needs no modification.

By the Court. The judgment of the circuit court is affirmed.

Dodge, J., took no part.

APPEAL—STARE DECISIS.—If the facts presented in two appeals are the same, the decision given on the first appeal becomes the law of the case in all its subsequent stages, and will not be reviewed on the second appeal: *Plymouth Bank v. Gilman*, 3 S. Dak. 170, 44 Am. St. Rep. 782; *Smith v. Smith*, 24 Colo. 527, 65 Am. St. Rep. 251. See the extended note to *Truxton v. Fait etc. Co.*, 73 Am. St. Rep. 98-106, discussing limitations on the doctrine of stare decisis.

WATERS.—THE SUBMERGED LANDS of navigable lakes within the boundaries of a state belong to the state in trust for the public use, substantially the same as at the common law, and the state cannot change the condition of the title to the detriment or abdication of such trust: *Pewaukee v. Savoy*, 103 Wis. 271, ante, p. 359, and note. The state cannot abdicate its trust over property in navigable waters and soil under them so as to leave them entirely under the use and control of private parties; its control over such property can never be lost, except as to such parcels as are used in promoting the interest of the public therein: See extended note to *People v. Kirk*, 53 Am. St. Rep. 293-296.

TO CONSTITUTE ESTOPPEL IN PAIS, there must be a false representation or concealment of known material facts, made to a party ignorant of their truth or falsity, and made with the intent that the latter party should act upon them, and he must have so acted: *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307; *Bynum v. Preston*, 69 Tex. 287, 5 Am. St. Rep. 49. See, too, *De Berry v. Wheeler*, 128 Mo. 84, 49 Am. St. Rep. 538.

PATTON v. LUDINGTON.

[103 WISCONSIN, 629.]

WILLS—CONSTRUCTION OF—DECEASED CHILD.—If a will declares that “the issue of any deceased child” of the testator “shall take by representation the share which his, her, or their parent would have taken if living,” the words “deceased child” refer only to such of the testator’s children as die before he dies, and not to one who survives him and takes a vested remainder under the will, but dies before coming into possession. If such surviving child marries and dies without issue, his widow is entitled, as his devisee and legatee, to the same share in the rents, issues, and income of the estate, and in the residue thereof upon its final distribution, as her husband would be entitled to if still living.

WILLS—CONSTRUCTION—REMAINDERS.—If an estate is devised in trust to provide an income for life beneficiaries, and at their death to divide among remaindermen as to whom there is no uncertainty, the trust estate vests in the trustees, not absolutely, but subject to the remainder over on the termination of the trust, and the remainder does not vest in the trustees at all.

WILLS—CONSTRUCTION—REMAINDERS.—The rule that if a testamentary gift is found only in a direction to divide at a future time, the gift is future and contingent, and not vested, is subordinate to the primary canon of construction that the intent to be collected from the whole will must prevail.

WILLS—CONSTRUCTION—REMAINDERS, WHEN VEST. The direction in a will for the trustees to pay over or distribute the net income of the estate or a portion thereof annually, or at other stated periods, to the beneficiaries, is evidence of an intent on the part of the testator to vest the equitable estate in them immediately upon the death of the testator.

WILLS—CONSTRUCTION—REMAINDERS, WHEN VEST. If an estate is bequeathed to executors in trust to collect the rents, issues, and profits during the life of the widow of the testator, and to pay over to her annually a certain part thereof and the balance thereof to be paid over and distributed semi-annually among all of the testator’s children living at the time of his death, equally, share and share alike, and upon the death of the widow to divide the corpus of the estate equally among all of his children, share and share alike, such estate becomes vested in such children immediately upon the death of the testator, subject to the execution of the trust; and such an estate satisfies a statute which declares in effect that future estates are vested when there is a person in being who would have an immediate right to the possession of the estate upon the ceasing of the intermediate or precedent estate.

WILLS—CONSTRUCTION—LEGACY, WHEN VESTS.—If, in a will, futurity is annexed to the substance of the gift, the vesting is suspended, but if it appears to relate to the time of payment only, the legacy vests instant, and words directing division or distribution between two or more objects at a future time are equivalent to a direction to pay.

WILLS.—REMAINDERS are not to be considered as contingent, in construing wills, in any case where, consistently with the intention of the testator, they may be construed as being vested.

WILLS—CONSTRUCTION.—In the construction of wills the law, in doubtful cases, leans in favor of an absolute, rather than a defeasible, estate, of a vested, rather than a contingent, one, of the

primary, rather than the secondary, interest, of the first, rather than the second, taker, as the principal object of the testator's bounty, and of a distribution as nearly conformed to the general rules of inheritance as possible.

WILLS—CONSTRUCTION—COUNSEL FEES.—In an action to construe a will, a judgment providing for the allowance to the respective parties of counsel fees, payable out of the estate, is erroneous.

J. H. Burke, C. Quarles, Turner, Bloodgood & Kemper, and Winkler, Flanders, Smith, Bottum & Vilas, for the appellants.

Bloodgood, Kemper & Bloodgood, Winkler, Flanders, Smith, Bottum & Vilas, for such of plaintiffs and defendants as were respondents.

637 CASSODAY, C. J. Aside from the Brown tract of thirteen acres of land in Wauwatosa, specifically devised to his grandson Harrison Ludington, and his father, Frederick, and which is not involved in this controversy, the general purposes of the testator, as expressed in his will, seem to have been to provide for his wife a comfortable home and support during her life, in lieu of all dower and all right and interest in his estate; and for that purpose, and others indicated in the will, his trustees were authorized and empowered, during the life of his wife, to sell and convey any and all personal ⁶³⁸ property and any and all real estate, and convert the same into money, and invest and keep invested the same for the purposes of the trust therein specified, and generally, for such purposes, and in their discretion, to convert realty into personalty and personalty into realty, subject, however, to the provisions that they were not authorized or directed to sell and convey the homestead, unless his wife should remove therefrom and reside elsewhere; that they should not sell his stocks, mentioned, until April 1, 1893, unless his wife and his youngest child, Frances L., surviving at the time of his death, should both die prior to that date, and that they should not sell or convey the three lots described (which for convenience we will designate as the business blocks) until April 1, 1908, unless his wife and Frances L. should both die prior to that date; and that, subject to such conditions, his trustees should, during the life of his wife, receive the rents, issues, and profits from his estate, real, personal, and mixed, and out of the same first pay to his wife the annuity mentioned, and secondly pay and distribute the remainder of

such annual rents, issues, and profits, semi-annually, "among all" his "children equally, share and share alike, the issue of any deceased child taking by representation the share thereof which his, her, or their parent would have taken if living," and upon the death of his wife, and subject to such conditions and the specific bequests and devises mentioned in the will, they were to divide his "estate equally among all" his "children, share and share alike, the issue of any deceased child" of his "to take by representation the share which his, her, or their parent would have taken if living"; and the will expressly provides that in such divisions no advancement or gift to any of his children, prior to January 1, 1883, was to be considered or taken into the account, but that all sums advanced and charged by the testator to either of his children after the day and year last mentioned were to be deemed advancements to ⁶³⁹ such child, and to be taken into account in such distribution. The general purpose of the testator to treat all his children alike is thus strikingly manifest. Harrison Ludington, Jr., lived for four years and five months after the death of his father. During that time the net income of the estate was distributed among the children semi-annually, the last distribution having been made November 9, 1895, six days prior to the death of Harrison Ludington, Jr. Since that time such distribution has been confined to the five living children of the testator, on the assumption that Harrison Ludington, Jr., never had any vested interest in the estate whatever, and that he lost all prospective interest in the estate by having died prior to his stepmother, when, by the terms of the will, the final distribution of the corpus of the estate was to be made, subject, however, to the limitation on the power of the sale of stock until April 1, 1893, and of the business blocks until April 1, 1908. As indicated, the will declares that "the issue of any deceased child" of the testator was "to take by representation the share which his, her, or their parent would have taken if living," not only of the corpus of the estate on the death of the widow, but also of the remainder of the "annual rents, issues, and profits, semi-annually," after satisfying the specific bequests mentioned. Upon the one hand it is contended that the words "deceased child," thus mentioned, refer only to a child who should die prior to the testator, and on the other hand it is contended that they also refer to a child who should survive the testator, and then die prior to the death of the widow. Which of these contentions is correct?

As soon as the will was admitted to probate, it took effect, by way of relation, as of the death of the testator: *Bridge v. Ward*, 35 Wis. 687; *Scott v. West*, 63 Wis. 552; *Graves v. Mitchell*, 90 Wis. 314; *In re Davis' Will*, 103 Wis. 455. The language of the will must be construed with reference to the time of the testator's death: *In re Davis' Will*, 103 Wis. 455; *Tucker v. Bishop*, 16 ⁶⁴⁰ N. Y. 404. It has frequently been held that, in the absence of other words showing a contrary intention, the words "the death of a child," in a clause of a will similar to the one last above quoted, refer to a death during the lifetime of the testator: *Livingston v. Greene*, 52 N. Y. 118; *Embury v. Sheldon*, 68 N. Y. 227; *Robert v. Corning*, 89 N. Y. 225; *In re Mahan*, 98 N. Y. 372; *Quackenbos v. Kingsland*, 102 N. Y. 128, 55 Am. Rep. 771; *Vanderzee v. Slingerland*, 103 N. Y. 47, 57 Am. Rep. 701; *Van Brunt v. Van Brunt*, 111 N. Y. 178; *In re Tienken*, 131 N. Y. 391; *In re Brown*, 154 N. Y. 313. In this last case it was expressly held that "when a devise or bequest is made to a class, as 'to children of children,' the class will, in the absence of a definite intention disclosed by the will, be ascertained and determined as of the death of the testator; and, if the estate then vests, it vests in the individual beneficiaries as tenants in common." To the same effect, *Smith v. Ashurst*, 34 Ala. 208; *Springer v. Congleton*, 30 Ga. 976; *Johnes v. Beers*, 57 Conn. 295, 14 Am. St. Rep. 101; *Whall v. Converse*, 146 Mass. 345. Thus, it is stated by a standard textwriter, in effect, that "a devise or bequest to the children of A, or of the testator, means *prima facie* to those of that class in existence at the testator's death, provided there be any at all to answer that description; and this rule extends to grandchildren, issue, brothers, nephews, and cousins"; and such presumption is not to be varied, whether an aggregate sum be given to the class, or a certain sum to each member of the class: *Schouler on Wills*, sec. 529. In the case at bar, there is nothing in the will to indicate that by use of the words "deceased child" the testator meant a child who should survive him and then die prior to the death of his widow. On the contrary, it clearly appears from the will that he meant that, if any of his children should die before he did, then the issue of such child, if any, should take "the share which his, her, or their parent would have taken if living." The manifest purpose of that clause in the will was to prevent such ⁶⁴¹ share from lapsing, as at common law it would have done had no such clause been inserted, and had such child died prior to the death

of the testator. That was settled one hundred and twenty years ago in the celebrated case of *Ackroyd v. Smithson*, 1 Brown Ch. 503; 7 Eng. Rul. Cas. 8; *Schaffer v. Kettell*, 14 Allen, 528. Since a will never goes into effect until the death of the testator, it is very obvious that a bequest or devise contained in a will cannot take effect in favor of persons who die before the testator: *Downing v. Marshall*, 23 N. Y. 370, 80 Am. Dec. 290. To obviate such effect, our statute, taken substantially from New York, as indicated in the last case cited, provides that "when a devise or legacy shall be made to any child or other relation of the testator, and the devisee or legatee shall die before the testator, leaving issue who shall survive the testator, such issue shall take the estate so given by the will in the same manner as the devisee or legatee would have done if he had survived the testator, unless a different disposition shall be made or directed by the will": Stats. 1898, sec. 2289. We must hold that by the words "deceased child," contained in the will, the testator referred to such of his children as should die before he did. But, as indicated, none of his six children died before he did. On the contrary, they are all still living, except Harrison Ludington, Jr., who died without issue. By the will the net income of the estate was to be distributed semi-annually, and the corpus of the estate was to be finally divided among all of the testator's children, share and share alike, the issue of any deceased child to take the share which his, her, or their parent would have taken if living; but there is nothing in the will as to such share going to the survivors, or any of them, in case any of such children should die without issue, nor does the will anywhere undertake to make any disposition of the share of any such child dying without issue. It is not the case, therefore, where the share of one dying without issue goes, by the terms of the will, to the survivors of ⁶⁴² the class, as in *Scott v. West*, 63 Wis. 533, where the testator, after the death of his two daughters, by the fourth clause of his will devised and bequeathed all the remainder of his estate to his "surviving grandchildren and to the legal issue of any deceased grandchild": See, also, *Campbell v. Stokes*, 142 N. Y. 23.

In support of the judgment on the merits it is contended, and the trial court held, that upon the death of the testator no right, title, or interest in any part of the testator's estate vested in any of his children, but that the right, title, and interest of all of his estate, real, personal, and mixed, became, on his death, vested in his executors and trustees and their

successors in office, and that they took the absolute title thereto and the whole thereof. Such ruling and contention is challenged by the widow of Harrison Ludington, Jr., on the ground that upon the death of the testator, and aside from the specific devise and specific bequests mentioned, the entire equitable right, title, and interest of the estate passed to, and became vested in, the six children equally, share and share alike, subject only to the execution of the trust. As indicated, and with the exceptions mentioned, the testator by his will gave, devised, and bequeathed all his estate to his executors and their successors in trust during the life of the testator's widow, for the uses and purposes therein mentioned, with authority and power, in their discretion and for the purposes of the trusts therein specified, to sell and convey, and to convert personalty into realty and realty into personalty, and to invest and keep the same invested, for the purposes mentioned, subject to the limitations and directions therein specified. The validity of the trust is conceded: Stats. 1898, sec. 2081.

Our statutes in respect to the "nature and qualities of certain estates," and "of uses and trusts," are taken almost entirely from New York: Stats. 1898, c. 95, 96; 1 N. Y. Rev. Stats. 1829, pt. 2, c. 1, tit. 2, arts. 1, 2. Among others, they contain ⁶⁴³ provisions to the effect that "estates, as respects the time of their enjoyment, are divided into estates in possession and estates in expectancy"; that "an estate in expectancy is where the right to the possession is postponed to a future period"; that "estates in expectancy are divided into 'future estates and reversions'"; that "a future estate is an estate limited to commence in possession at a future day"; that "when a future estate is dependent upon a precedent estate it may be termed a remainder, and may be created and transferred by that name"; that "future estates are either vested or contingent"; that "they are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate"; that "they are contingent whilst the person to whom, or the event upon which, they are limited to take effect, remains uncertain"; that "expectant estates are descendible, devisable, and alienable in the same manner as estates in possession"; that "where an expectant estate . . . is created by devise, the death of the testator shall be deemed the time of the creation of the estate"; that "a devise of lands to executors or other trustees to be sold or mortgaged, where such trustees are not also empowered to re-

ceive the rents and profits, shall vest no estate in the trustees; but the trust shall be valid as a power," etc.; that "every express trust, valid as such in its creation, except as herein otherwise provided, shall vest the whole estate in the trustees, subject only to the execution of the trust; and the person for whose benefit the trust was created shall take no estate or interest in the lands, but may enforce the performance of the trust"; but this last "section shall not prevent any person creating a trust from declaring to whom the lands to which the trust relates shall belong in the event of the failure or determination of the trust, nor shall it prevent him from granting or devising such lands subject to the execution of the trust; and every ⁶⁴⁴ such grantee shall have a legal estate in the lands as against all persons except the trustees and those lawfully claiming under them"; and that "whenever an express trust is created every estate and interest not embraced in the trust and not otherwise disposed of shall remain in or revert to the person creating the trust or his heirs as a legal estate": Stats. 1898, secs. 2031-2035, 2037, 2059, 2060, 2065, 2082, 2086-2088.

Under such statutes it is well settled in New York "that the trustees take a legal estate commensurate with the equitable estate, and that outside of that there may be remainders and future estates, or powers of sale adequate to terminate the trust": *In re Tienken*, 131 N. Y. 401. See, also, *Manice v. Manice*, 43 N. Y. 363, 364, and cases there cited. In that case, as in the case at bar, there were, outside of the trust, and in the language of the statute quoted (Stats. 1898, sec. 2033), "future estates and reversions," either disposed of by the will, or passed by descent under the statute (Stats. 1898, sec. 2270). So it has been held in New York that, "where an estate is devised in trust, to provide an income for life beneficiaries, and at their death to divide among remaindermen as to whom there is no uncertainty, the trust estate vests in the trustees, not absolutely, but subject to the remainder over on the termination of the trust, and the remainder does not vest in the trustees at all": *In re Brown*, 154 N. Y. 314. So it has been held in that state: "Where the apparent intention of the testator is that remainders shall vest in persons as to whom there is no uncertainty, subject to the life estate or estates created by the will, . . . the disposition relates back to the time of the testator's death, and the vesting is of that date. The presence in a will of an imperative power of sale, given to the executors to be exercised at a future time, does not necessarily

prevent a vesting, especially when it is apparent from the other provisions of the will that it was intended that the estate should vest presently": ⁶⁴⁵ *In re Brown*, 154 N. Y. 314. This court has construed such statutes as vesting the legal estate or title in the trustees for the purposes of the trust, and vesting the equitable estate in the cestui que trust: *Baker v. McLeod*, 79 Wis. 540, 541, and cases there cited.

In some of the cases cited above, and in several hereinafter cited, it was held that the power of sale in no manner enlarged or changed the quality of the estate vested in the trustees. Under such statutes it has also been frequently held in that state, in effect, that where an estate is given, devised, and bequeathed to executors in trust to be paid over to a person or class of persons named or described, upon an event which is uncertain at the time of the creation of the estate and may never happen, or to a person or to persons then unascertainable, the right to such payment is contingent and not vested: *Gilman v. Reddington*, 24 N. Y. 9; *Manice v. Manice*, 43 N. Y. 378, 379; *Smith v. Edwards*, 88 N. Y. 92, 104; *Shipman v. Rollins*, 98 N. Y. 311; *In re Baer*, 147 N. Y. 348. But even "the general rule that, when a testamentary gift is found only in a direction to divide at a future time, the gift is future and contingent and not vested, is subordinate to the primary canon of construction, that the intent to be collected from the whole will must prevail": *In re Brown*, 154 N. Y. 314; *Goebel v. Wolf*, 113 N. Y. 405, 10 Am. St. Rep. 464. The direction for the trustees to pay over or distribute the net income of the estate, or a portion thereof, annually, or at other stated periods, to the beneficiaries—as, for instance, the children of the testator, in the case at bar—is evidence of an intent on the part of the testator to vest the equitable estate in them immediately upon the death of the testator: *In re Brown*, 154 N. Y. 314. See, also, *Willett v. Rutter*, 84 Ky. 317; *Toms v. Williams*, 41 Mich. 565. This will be more fully supported by authorities hereinafter cited.

On the other hand, it has been frequently held, under such ⁶⁴⁶ statutes, in that state, in effect, that where, as here, an estate is given, devised, and bequeathed to executors in trust to collect the rents, issues, and profits or income thereof during the life of the widow, and to pay over to her annually a certain part thereof, and the balance thereof to be paid over and distributed semi-annually among all of the testator's children living at the time of his death, equally, share and share alike, and

upon the death of the widow to divide the corpus of the estate equally among all his children, share and share alike, such estate becomes vested in such children immediately upon the death of the testator, subject, of course, to the execution of the trust. Such an estate satisfies the statute which declares, in effect, that future estates are vested when there is a person in being who would have an immediate right to the possession of the estate upon the ceasing of the intermediate or precedent estate: Stats. 1898, sec. 2037; Saxton v. Webber, 83 Wis. 624. Chief Justice Denio states the rule thus: "The leading inquiry upon which the question of vesting or not vesting turns is whether the gift is immediate, and the time of payment or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving of age, or surviving some person, or the like. If futurity is annexed to the substance of the gift, the vesting is suspended; but, if it appear to relate to the time of payment only, the legacy vests instantan. . . . And words directing division or distribution between two or more objects at a future time are equivalent to a direction to pay": Everitt v. Everitt, 29 N. Y. 75. See Stark v. Conde, 100 Wis. 641. In that New York case it was held that the interest in the fund created for the benefit of the younger children vested in them immediately upon the death of the testator, though the fund was not payable to them until the youngest child attained her majority: See, also, Embury v. Sheldon, 68 N. Y. 227; In re Mahan, 98 N. Y. 372; Van Brunt v. Van Brunt, 111 N. Y. 178; Bowditch v. Ayrault, 647 138 N. Y. 222. It has also been held in New York that, "where by the terms of a bequest the gift is to be severed instantan from the general estate, and to be held by trustees for a specified time for the benefit of the legatee, and then to be paid over to him, and in the meantime the interest thereof to be paid to him, this is indicative of the intent of the testator that the legatee shall at all events have the principal, and is to wait only for the payment until the day fixed": Warner v. Durant, 76 N. Y. 133. In Goebel v. Wolf, 113 N. Y. 405, 10 Am. St. Rep. 464, the testator gave the residue of his estate to trustees, in trust to pay one-half of the net profits and income to his widow for the support of herself and her minor children, and to apply the other half in payment of mortgages, and after such payment to invest the residue for the benefit of his children; and then, after providing for an advancement to each child upon becoming of age or marrying, he directed that upon

the death of his widow, and his youngest child becoming of age, his estate should be equally divided among his children; and it was "held that the gift was not to the children as a class, but each took a vested remainder in one-fourth of the residuary estate, dependent upon the termination of the trust, and that the share of the one who died, with the accumulations of income therefrom, descended to his heirs or next of kin according to the nature of the property; also, that such descendants were entitled to any income that may hereafter accrue during the trust period."

So it has been held in that state that "a remainder is not to be considered as contingent in any case where, consistently with the intention of the testator, it may be construed as being vested": *Hersee v. Simpson*, 154 N. Y. 496. Even "the words 'from and after,' in a testamentary gift of a remainder, following a life estate, do not make the remainder contingent and prevent its being construed as vested, where there is nothing else on the face of the will tending to show ⁶⁴⁸ that the vesting of the remainder was postponed, or intended to be postponed, beyond the death of the testator": *Hersee v. Simpson*, 154 N. Y. 496. See, also, *Wellford v. Snyder*, 137 U. S. 521; *Dale v. White*, 33 Conn. 294; *Johnes v. Beers*, 57 Conn. 295, 14 Am. St. Rep. 101; *Scofield v. Olcott*, 120 Ill. 362; *Grimmer v. Friedrich*, 164 Ill. 245; *Owens v. Dunn*, 85 Tenn. 131; *Wedekind v. Hallenberg*, 88 Ky. 114; *Marsh v. Hoyt*, 161 Mass. 459; *Reed's Appeal*, 118 Pa. St. 215, 4 Am. St. Rep. 588; *Neilson v. Bishop*, 45 N. J. Eq. 473; *Bonnell v. Bonnell*, 47 N. J. Eq. 540; *Cook v. McDowell*, 52 N. J. Eq. 351. Some of these cases are quite similar to the case at bar. Thus, in the last case cited, the testator directed his executors to sell his real estate, and invest the proceeds during the life of his widow, and upon her death divide the corpus of the estate between his six children, share and share alike; and in case any of his children should "die before receiving their share, leaving issue," then he gave, devised, and bequeathed "to such issue the share the parent would have taken if living." One of his children, a son, survived his father, but died without issue before he came into actual possession of any part of the estate; and it was held, in effect, that upon the death of the testator such son took a vested interest in one-sixth part of the estate, which passed by his will, subject to the execution of the trust. The case of *Bonnell v. Bonnell*, 47 N. J. Eq. 540, is quite similar.

The cases in this court, so far as they have any bearing upon the question presented, are in harmony with the views expressed. In *Baker v. McLeod*, 79 Wis. 534, the testator died leaving a will, executed a week before, and in and by which he gave, devised, and bequeathed all his estate to a trustee, in trust, with power of sale and reinvestment, and to pay debts and expenses, and to pay Miss Ritchie, who had had the care of his little girl, Annie May, then less than four years old, since the death of his wife, and to pay and apply the rents, profits, and income thereof to the maintenance and education of Annie May until she should become ⁶⁴⁹ twenty-one years of age, and then the residue to be paid over and transferred to her, but that in case Annie May should die under twenty-one years of age, then such remainder should immediately be paid, applied, and disposed of as follows: Two thousand dollars to Miss Ritchie, if living; eight thousand dollars to a church named; and the balance to the executors and trustees. Annie May married, and subsequently gave birth to a little boy, named George, and then died before she was twenty-one years of age; and, in construing the will, this court held that the estate vested in Annie May immediately upon the death of her father, subject only to the condition that, in case she should die under age and without issue, then the gift over to Miss Ritchie, the church, and executors should become effectual. Following the adjudications in England and this country, the words "without issue" were supplied by construction: *Dunlop v. Greer* (1899), 1 L. R. Eq. 324. In *Burnham v. Burnham*, 79 Wis. 557, the testator, by his will, executed April 22, 1874, after making certain bequests, and subject to certain provisions, gave to his wife an estate for life, with remainder to his children, including Daniel G., who became an inebriate and spendthrift, and was put under guardianship. Thereupon, on February 3, 1883, the testator executed a codicil to his will, wherein he declared that his son Daniel G. should not have nor receive any part of his estate unless within five years after his death Daniel G. should reform and become a sober and respectable citizen, of good moral character, of which his executors were to be the sole judges; that the executors were to hold the share which would otherwise go to Daniel G. in trust during the five years, and pay out of the same two hundred dollars a year for the support and education of each of Daniel G.'s children, etc. March 2, 1889, the testator died, leaving an estate of one million dollars. April 4, 1889, the will

and codicil were admitted to probate. January 18, 1890, Daniel G. died intestate, leaving a widow and three children. In construing the will, this court held, ⁶⁵⁰ in effect, that, upon the death of the testator, Daniel G.'s share of the estate immediately vested in him, subject to be divested by failure to perform the conditions named, and that the mere fact that the conditions were possible at the time the will went into effect, but afterward became impossible by the act of God, did not operate to divest the estate, but upon the death of Daniel G. the same became absolute: *Stark v. Conde*, 100 Wis. 643. "In the construction of wills, the law, in doubtful cases, leans in favor of an absolute, rather than a defeasible, estate; of a vested, rather than a contingent, one; of the primary, rather than the secondary, interest; of the first, rather than the second, taker, as the principal object of the testator's bounty; and of a distribution as nearly conformed to the general rules of inheritance as possible": *Smith's Appeal*, 23 Pa. St. 9; *Burnham v. Burnham*, 79 Wis. 566.

On the death of the testator, Harrison Ludington, Jr., was living, and soon after married, and after a few years died without issue, leaving a will, which was admitted to probate, and in and by which he gave, devised, and bequeathed all his property to his widow, the defendant Emma Blessing Ludington. Except as provided in the will, and subject to the trusts and limitations therein contained, and for the reasons given, we must hold that immediately upon the death of the testator the reversionary and equitable interests in the estate became vested in his six children then living, equally, share and share alike, and upon the death of Harrison Ludington, Jr., November 15, 1895, his share thereof passed to his widow, as devisee and legatee, and that she thereupon became entitled, and is entitled, to the same share of the rents, issues, profits, and income thereof, and the same share of the residue of the estate upon final division thereof, as her husband would have been entitled to if he were still living. In other respects the will appears to have been correctly construed by the trial court.

⁶⁵¹ The plaintiff, as executors and trustees, have appealed from that part of the judgment awarding costs and disbursements of each and every party to the action to be paid out of the estate, and directing the county court to make allowance to the respective parties for counsel fees out of the estate. This court has just condemned such rulings: *In re Donges' Estate*, 103 Wis. 497, ante, p. 885. What is there said by my brother

Dodge fully covers the questions involved in the appeal of the plaintiffs in the case at bar. Further discussion is unnecessary.

By the Court. The judgment of the circuit court is reversed on both appeals, and the cause is remanded with direction to enter judgment in accordance with this opinion. Taxable costs and disbursements are to be allowed in favor of the defendant Emma Blessing Ludington and against the plaintiffs, both in this court and the trial court, the same to be payable out of the estate.

WILLS—INTENT OF TESTATOR.—The rule that controls all others in the interpretation of wills is, that the intention of the testator, which must be gathered from the entire will, must govern: See note to *Johnes v. Beers*, 14 Am. St. Rep. 106.

LEGACIES—WHEN VESTED.—The general rule is, that if futurity is annexed to the substance of the gift, the vesting is suspended; but if the gift is absolute, and the time of payment only is postponed, the gift vests at once: Extended note to *Goebel v. Wolf*, 10 Am. St. Rep. 471. See, further, the notes to *Ducker v. Burnham*, 37 Am. St. Rep. 147, and *L'Etourneau v. Henquenet*, 28 Am. St. Rep. 320.

DEVISE TO CHILDREN AS A CLASS.—A devise to a class of persons takes effect in favor of those who constitute the class at the death of the testator: See extended note to *Loockerman v. McBlair*, 46 Am. Dec. 667. A devise to the children of a testator's son comprehends only those living at the time of the testator's death: *Shotts v. Poe*, 47 Md. 513, 28 Am. Rep. 485. See, too, *Chase v. Lockerman*, 11 Gill & J. 185, 35 Am. Dec. 277; *In re Tucker's Will*, 63 Vt. 104, 25 Am. St. Rep. 743, and note.

DEVISE—ESTATE, WHEN VESTED.—The law favors the vesting of estates, and, if possible, construes the terms of a will as creating a vested estate: *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135, and note. In the absence of a clear intent to the contrary, the law presumes that a testator intended his estate to vest in his children the moment the will should become operative: *Johnes v. Beers*, 57 Conn. 295, 14 Am. St. Rep. 101.

DEVISE—VESTED REMAINDERS.—A will providing that "at the decease of my wife all my estate shall go to and be equally divided among my children, the issue of a deceased child standing in the place of a parent," creates a vested remainder: *Gibbons v. Gibbons*, 140 Mass. 102, 54 Am. Rep. 453. A devisee who is withheld from possession only by the temporary right of enjoyment in another has a vested transmissible interest: *Bentley v. Long*, 1 Strob. Eq. 43, 47 Am. Dec. 523. See, also, *L'Etourneau v. Henquenet*, 89 Mich. 428, 28 Am. St. Rep. 310; *Mercantile Bank v. Ballard*, 83 Ky. 481, 4 Am. St. Rep. 160.

WILLS—COSTS OF CONTEST.—Under a statute permitting the court in contests of wills to award costs to either party, in its discretion, to be paid by either or out of the estate as justice and equity shall require, no more than actual taxable costs can be allowed: *Cheever v. North*, 106 Mich. 390, 58 Am. St. Rep. 499. But see *Seebrook v. Fedewa*, 33 Neb. 413, 29 Am. St. Rep. 488, and note.

INDEX TO THE NOTES.

ACTIONS against receivers for property taken possession of by order of court, 297.

against receivers, leave to commence, whether and when necessary, 286-290.

against receivers for negligence or trespass, 289.

AGENCY of child for parent, presumption respecting, 803.

ATTORNEYS, clients, power of, to settle cases after contracting to pay a contingent fee, 90, 91.

compensation, elements to be considered in fixing, 91.

BANKING, certification of checks, effect of, 189.

forged checks, recovery of moneys paid on, 188.

BANKS, collecting agencies, duties of, as, 536.

BILLS OF LADING, when conclusive as to quantity, 488.

BOYCOTTING, injunction against, 435.

BROKERS are pledgees when they purchase on margin, 471.

conversion of stock, subsequent purchase of stock does not avoid liability for, 480.

conversion, waiver of right to insist upon, 480.

conversion, when guilty of, 480.

custom of to sell without demanding additional margin, 479.

custom of, to repledge stock purchased on margin, 473.

customs, parties dealing with are bound by, 473, 474.

customs which are unknown to clients, 474.

demand for more margin necessary to authorize sale for deficiency in, 478.

fictitious purchase by entitles purchaser to recover margin, 481.

fluctuation in price, sudden, whether warrants sale without notice and demand to make margin good, 478.

insolvency of, debtor and creditor clients placed on the same footing, 482.

insolvency of, equities of customers who have deposited security which can be repledged by broker, 482.

insolvency of, purchasers' rights on, 481.

instructions of client, duty to obey, though purchase is on a margin, 476.

liability of, for refusing to sell stocks purchased on a margin, 476.

- BROKERS, liability of, for selling without instructions stocks purchased on a margin, 476.**
 legality of contracts between and their clients, 470.
 lien of, right to is not lost by unauthorized sales, 483.
 margin, duty of, to sell on, when directed, 475.
 margin, relation existing between broker and client after purchase on, 471.
 margin, right of broker to recover where purchaser does not follow instructions, 481.
 margin, right of, to sell when purchaser fails to maintain, 477.
 margin, purchase on, defined, 470.
 margin, sale on, when occurs, 471.
 notice of sale, agreements excusing, 479.
 notice to furnish additional margin, waiver of right to object to, 479.
 notice to furnish additional margins, what reasonable, 479.
 notice to purchaser of intention to sell because margin is not kept good, 477.
 pledge by, of stock for more than the amount of their loans or advances, 475.
 pledge by, of stocks purchased on margin, 473, 474.
 relation between, and client is that of principal and agent, though broker holds the property as security, 476.
 remedies of, against purchasers, 483.
 remedies of purchaser against, for unauthorized sale, 480.
 right of, to repledge stocks purchased on margin, 472, 473, 475.
 rights of, as pledgees of property purchased, 472.
 sale by, because margin is not maintained, time and mode of may be fixed by agreement, 477, 478.
 sale by, without demanding additional margin, 477.
 specific certificates of stock need not be kept on hand, 474.
 stocks, purchasing, need not be kept separate from other stocks of like character, 473.

CARRIERS, combinations among which amount to unlawful trusts, 249.

CHILDREN, agency of for parents, when presumed, 803.

- authority of father over, 801.
- negligence of, parents' liability for, 801, 802, 804.
- torts of, liability of parents for, 801, 802.

See Parent and Child.

CONTRACTS, consideration of which is void in part, 580.

- wagering, sale of goods to be delivered in the future, 401.

CORPORATIONS, directors of, frauds, when liable for, 611.

- directors of, issuing illegal stock, liability of, 612.
- directors of, liability of, for positive wrongs, 610.
- directors of, nuisances, liability of for, 611.
- directors of, personal liability of for misapplication of assets, 612.

- CORPORATIONS**, directors of, personal liability of, for misconduct resulting in the insolvency of the corporation, 611, 612.
 directors of, torts, liability for, 610.
 directors of, trespasses, when liable for, 611.
 insolvent, preferences by, 844.
 partnerships between, when beneficial, 236.
 preferences in favor of officers of insolvent, 844.
 purchase by one of the stock of another, 237.
- COTENANTS**, right of one to recover possession of the whole property as against a stranger to the common title, 790.
- DEEDS**, delivery after the grantor's death, 903.
- DEFINITION** of forgery, 38.
 of mistake of fact, 885.
 of purchase on margin, 470.
- DEMURRER** to evidence, when should be sustained, 536.
- DOGS**, nuisances, when are so that the right to kill arises, 360.
- DOWER**, when subject to the payment of husband's debts, 441.
- EMBEZZLEMENT**, difference between and larceny, 325.
- EQUITY**, jurisdiction of to enforce liens, 387-390.
 liens, common-law and statutory, when enforceable in, 388.
 liens, equitable, must be enforced in, 388.
 liens of carriers, jurisdiction to enforce, 389.
 liens on personal property, jurisdiction of to enforce, 389.
 mechanics' liens are enforceable in, 389.
 statutory liens cannot be extended by, 389.
 statutory liens, jurisdiction of to enforce, 389.
- EVIDENCE** by either husband or wife against the other, 149.
 declarations of conspirators, 149.
- EXECUTORS AND ADMINISTRATORS**, competency of persons to be appointed, 124.
- EXECUTION**, mandamus to compel the issuing of, 152, 153.
 mandamus to compel the levy of, 153.
 mandamus to compel the setting aside of exempt property, 153.
 presumption in favor of sheriff's deeds, 334.
 sale of property in the hands of receivers, 286, 287.
- GARNISHMENT** of receivers, 290, 299.
- HOMESTEAD**, purchase money, money borrowed, when deemed to be, 109.
- HOMICIDE**, danger to members of one's family, right to resist, 736.
 in defense of a member of one's family who has lost the right of self-defense, 736.
 in defense of a stranger, 737.
 in defense of other persons, 735.
 in defense of property, 737.
 See Self-defense.

INJUNCTION against boycotting, 435.

INNKEEPERS, lien of, whether extends to property in the possession of, but not belonging to, a guest, 795.

INSURANCE, accident, death caused by rupture of a blood vessel, 123.

combinations relating to which create forbidden trusts, 259, 260.

foreclosure proceedings, commencement of, what is, 527.

walver by local agent of forfeiture arising from commencement of foreclosure proceedings, 527.

INTOXICATING LIQUORS, combinations to fix the price or restrict the sale of, whether may constitute forbidden trusts, 257, 258.

JUDGMENT against a receiver, effect of, 287, 296, 298, 299.
of justices of the peace, presumption in favor of, 858.

LABORERS, combinations among which amount to a forbidden trust, 264, 265.

LIENS, common-law or statutory, when enforceable in equity, 388, 389.

equitable are governed by the general doctrine applicable to trusts, 387.

equitable, enforcement of, must be in courts of equity, 387.

equitable, when arise, 387.

mechanics', are enforceable in equity, 388.

MANDAMUS, against a clerk of a court to compel the issuing of an execution, 152.

against a sheriff to compel the levy of an execution, 153.

execution, cases denying that the issue or levy of will be compelled by, 153.

execution, issue of may be compelled by, 152.

to compel the setting aside of exempt property, 153.

MARGINS, definition of a purchase upon, 470, 471.

duty of broker purchasing upon, to sell when directed, 475.

notice to furnish additional, 477, 479.

right of broker to recover, 481.

sale, right of broker to make because the purchaser does not maintain, 477.

MECHANICS' LIENS, machinery and fixtures, claims for, when deemed secured by, 571.

several houses on different lots, when may be united in one claim, 570.

MISTAKE, relief against, when will not be granted, 885.

MUNICIPAL CORPORATION, pollution of waters by, when will not be enjoined, 312.

NEGLIGENCE of children, parents, when liable for, 804.
of receivers and their agents and employés, 289.
presumption of, in the case of a railway accident, 693.

NEWS, combinations respecting the publication of which amount to forbidden trusts, 262-264.

PARENT AND CHILD, acts done by children in the course of their parents' business, liability for, 804, 805.

agency of child for parent, there is no presumption of, 803.

dangerous weapons, liability of father who permits his minor children to use, 806, 807.

father is not liable for wrongful acts of his child, 801.

father, liability of, for wrongful acts of his children at the civil law, 807.

father's authority over minor children, 801.

liability of father for acts of his children where its existence rests on the principle of agency, 803.

liability of father for not restraining children from wrongful and dangerous acts, 806.

master and servant, relation of, when exists between, 805.

negligence of children, parents are not answerable for, 801, 802.

negligence of children while in their father's service, when imputable to him, 804.

ratification by father of the wrongful acts of his children, 807.

torts of children, parents are not answerable for, 801, 802

trespass of children, parents are not answerable for, 802.

PARTITION, improvements, allowing of to the cotenant making them, 654.

PATENT RIGHTS, combinations among holders which create forbidden trusts, 261.

PUBLIC ROADS, exemption from duty of working upon, 669.

labor upon, requirement of is not an imposition of taxes, 667.

labor upon, requiring of persons not able-bodied, 667, 668.

labor upon, statutes exacting of male citizens are constitutional, 667.

labor upon, statutes exacting of male citizens, whether must be uniform, 667.

municipal corporations, authority of to require labor upon, 667.

nonresidents, whether and when may be required to work upon, 668.

notice to be given to persons required to work upon, 668, 669.

notice to work upon, failure to give, 668.

penalties may be imposed upon persons refusing to work upon, 667.

police regulations, statutes requiring labor upon are, 667.

RAILWAYS, agreements between not to invade each other's territory, 253, 254.

agreements by to grant exclusive privileges to their depot grounds, 277.

combinations among to prevent ruinous competition, 250-252.

combinations among which create unlawful trusts, 249, 250.

- RAILWAYS**, competition between, whether the court may determine how much is beneficial to the public, 253.
 contracts between and telegraph companies to give the latter the exclusive use of the right of way, 254, 255.
- RECEIVERS**, actions against, for property taken possession of by the order of the court, 297.
 actions against, leave to commence, whether and when necessary, 286-290.
 actions against persons whom they represent may be maintained without first asking leave to sue, 291, 292.
 actions against persons whose property is in the hands of, 290.
 appointed by the national courts, garnishment of, 297.
 appointed by the national courts, when may be sued without leave of the court, 297.
 appointment of by the national courts does not deprive state courts of jurisdiction previously existing, 293.
 appointment of, does not abate personal actions pending against the debtor, 287.
 appointment of, for corporations does not destroy their capacity to sue, 292.
 custody of, is the custody of the court, 286.
 custody of, will not be interfered with by a court other than that appointing them, 285.
 execution sale of property in possession of, 286, 287.
 foreclosure of mortgages against cannot be sustained without leave of the court, 296.
 garnishment of, 299.
 garnishment of, without first seeking leave of the court, 290.
 injunctions against, prosecutions of actions against, 298.
 judgments against, effect of, 296, 298, 299.
 judgments against in their official capacity are payable only out of funds in their hands, 287.
 jurisdiction where leave to sue is not obtained, 288.
 jury trial, right of in actions against, 290.
 leave of court to sue persons whose estates are in the hands of, is not necessary, 291, 292.
 leave to sue, effect of not seeking prior to the commencement of the suit, 287.
 leave to sue is not necessary where they are trespassers, 289.
 leave to sue, waiver of the procurement of, prior to the suit, 288.
 leave to sue, when necessary in actions for torts, 289.
 leave to sue, when obtaining of, is excused by the act of Congress, 293.
 leave to sue, whether indispensable, 286, 287.
 negligence, actions against for, leave to sue need not be asked, 289.
 of railways operated in two or more states, 299.
 of the national courts, counterclaims and setoffs may be asserted in the national courts, 294.

RECEIVERS of the national courts, state courts will not issue process against property in the hands of, 286.
of the national courts, when may be sued without first obtaining leave of court, 293.
possession of, will be protected by the court, 286.
removal by, of suits from the state to the national courts, 298.
resignation, actions against after, 295, 296.
suits against, leave of the court must generally be obtained before bringing, 286, 287.
suits against must be authorized by statute or by the court appointing them, 286.
suits against on a moneyed demand, 286.
trespass, action of, when cannot be maintained against without asking leave of the court to sue, 289.

SELF-DEFENSE, acts which will justify the exercise of the right to the extent of taking human life, 725.
apparent danger justifies the exercise of the right of, 719, 720.
assault repelled by, need not be with a deadly weapon, 725.
belief in danger due to slayer's fault or carelessness, 721.
belief of danger, when justifiable, 724, 725.
bodily harm, threatened, which will justify the exercise of the right of, 725.
civil trespass, when does not justify exercise of the right of, 740.
danger must be immediate, 719.
danger must be urgent and pressing, 722.
danger, whether must be judged from the defendant's standpoint, 723.
danger which will justify resort to, 717.
danger which will justify the exercise of the right of, tests of, 720.
death partly due to injuries inflicted in the exercise of the right of and partly to injuries inflicted afterward, 719.
duty of retiring from attack, 718.
fault which will deprive one of the benefit of the plea of, 733.
honest fear not justified by the circumstances, 723, 724.
if right of exists, it is not material that there was an attempt to kill, 718, 719.
imperfect right of, 733.
in defense of other persons, 735.
in resistance of an unlawful arrest, 726.
in resisting a mere trespass, 739.
in resisting a trespass made with force, 740.
intoxicated person, exercising the right of against, 726.
malice does not neutralize the defense of, 719.
necessity must be such as to induce a reasonably prudent man to believe himself in danger, 720, 721.

- SELF-DEFENSE**, necessity which will justify to the extent of taking human life, 717.
 of habitation or property, 738.
 perfect right of, 733, 734.
 provoking a difficulty deprives one of the right of to the extent of taking life, 731.
 provoking difficulties, seeking an explanation is not necessarily, 732.
 provoking difficulties so as to take away the right of, 732.
 real danger justifies the exercise of the right of, 719, 720.
 retreat, duty of, common law respecting, 726.
 retreat, duty of, does not exist when one is unlawfully assaulted, 730.
 retreat of a person not himself in fault is not required, 730.
 retreat, police officer need not resort to, 729.
 retreat, where escape would not result in ultimate safety, 729.
 retreat where person is assaulted on his own premises, 727, 728.
 retreat which would increase the peril of the assault, 727.
 seducer, when not entitled to exercise the right of, 731.
 threats do not justify the exercise of the right of, 724.
 withdrawal from combat by an aggressor entitles him to exercise the right of, 734.
 withdrawal from combat, the intention to withdraw must be made known to the adversary, 735.
 withdrawal from combat, what is, 735.
- SLEEPING-CAR CORPORATIONS**, duties of to passengers, 62.
- SPECIFIC PERFORMANCE** of contract to transfer personal property, 689.
 parol contract to convey lands, 501.
- STATUTE OF FRAUDS**, agreements to purchase land for joint benefit, 37.
- STOLEN PROPERTY**, possession of is evidence of guilt, 156.
- STREETS**, abutting landowner is presumed to own the land beneath, 785.
- TAX SALES**, notice to redeem, statute requiring is mandatory, 463.
- TELEGRAPH CORPORATIONS**, rules of, when binding on their patrons, 401.
- TENANCY BY THE ENTIRETIES**, presumption in favor of, 100.
- TRADE**, contracts in restraint of, are not enforceable by the common law, 236.
 contracts in restraint of, were not criminal by the common law, 236.
 contracts in restraint of, tests of validity of, 238, 239, 246.
 contracts in restraint of, to what extent sustainable, 246, 247.
 contracts in restraint of, when valid, 238.

TRUSTS are judged by their objects rather than by their effects, 271.

carriers, combinations among, 249.

combinations which are necessarily unlawful as creating, 244.

commodities, necessities of life, what are, 268, 269.

commodities, whether must be necessities of life to make combination respecting them unlawful, 268, 270.

common-law rule respecting, 254.

competition, agreements which destroy or decrease, 244, 245.

competition, ruinous combinations to prevent, 251, 252.

competition, whether courts may assume to determine how much is desirable, 241, 245, 253.

competition, whether may be lawfully restricted by contract, 239, 240.

concert of action and purpose between several is essential to the creation of, 243.

contractors, combinations among which are forbidden, 267.

contracts to abandon one's business to enter the permanent employment of another, 242.

contracts to buy entire product of a manufacturer do not create, 242.

corporations are not necessary to the formation of, 237.

dealers in commodities, combinations between, 255-259.

defense that a monopoly has not in fact been created, 272.

defense that they have resulted in reducing prices, 271.

defenses to avoid the law against, 248.

difference between and unlawful restraint upon trade, 239-241.

form of agreement is not controlling, 236.

instances of unlawful, 244-249.

insurance, combinations relating to, 259, 260.

intoxicating liquors, combinations fixing the price or restricting the sale of, 257, 258.

laborers, combinations among to fix prices, 265.

laborers, combinations among which create forbidden, 264.

leasing property to prevent its use, 248.

manufacturers, combinations among which amount to illegal, 241, 242.

monopoly, forbidden, when exists, 266.

monopoly, tendency to create is a test of, 241.

news, combinations relating to the publication of, 262-264.

patent rights, combination between holders of which create a forbidden, 261.

prices of articles, associations for the purpose of controlling, 236.

private individuals may form as well as corporations, 238.

purchase of plants of rival manufacturers does not create a, 242.

purpose of, is to create a monopoly, 239.

purposes, unlawful, necessity for the concurrence therein of all the parties, 243.

TRUSTS, railways, agreements between not to invade each other's territory, 253, 254.

 railways, combinations among to prevent ruinous competition, 250, 252.

 railways, combinations which create unlawful, 250, 252.

 railways, competition between, whether the court may determine how much is beneficial to the public, 253.

 railways, contracts between and telegraph companies to give the latter exclusive use of the right of way, 254, 255.

 restriction in competition is an essential element of, 239.

 statutes denouncing, 272, 273.

 tests of illegal, 240, 244.

 to fix the production or increase the price of commodities, 214.

 unlawful, definition of, 236.

 unlawful, form of the original scheme of, 236.

 unlawful, partnerships between corporations, 236.

 vesting the property of several corporations in one, 236.

WATERS, prescriptive right to flow the lands of another, 863.

WILLS, attestation of, in the presence of the testator, what is,
 642.

INDEX.

ABANDONMENT.

See Landlord and Tenant, 1; Municipal Corporations, 1.

ACCOUNTING.

See Mortgages; Trusts, 5.

ACTIONS.

See Negligence, 2, 4; Negotiable Instruments, 11; Parent and Child; Pleading, 1; Sales, 2, 4; Witnesses, 14.

ADDITIONAL SERVITUDES.

See Railroad Companies, 15.

AGENCY.

1. AGENCY—WHEN AGENT ALONE LIABLE ON NOTE.—When a sale is made to one who is acting as agent for a principal who is known to the vendor, and only the personal obligation of the agent is taken for the price of the property sold, the presumption arises that personal credit is given to the agent alone. (*Merrill v. Witherby*, 39.)

2. EXEMPTION OF PERSONAL PROPERTY—WAIVER OF—POWER OF ATTORNEY.—Where a statute provides that one may waive his right of exemption as to personal property by an instrument executed by him, an agent of such a person, acting under a power of attorney, to manage all his principal's business, cannot execute a promissory note in the name of his principal, and in it waive his principal's right of exemptions, where the power of attorney does not expressly confer such a power, though the note itself is a binding obligation. (*Lippman v. First Nat. Bank*, 28.)

See Telegraph Companies, 3.

ANIMALS.

1. DOGS—PROPERTY IN.—A dog is property, for an injury to which an action will lie. (*Chapman v. Decrow*, 357.)

2. DOGS—NUISANCE—RIGHT TO KILL.—Although a dog is unlicensed, no individual is authorized to kill it on the ground that it is a public nuisance, unless he has suffered damages therefrom peculiar to himself and distinct from the injury to the public. (*Chapman v. Decrow*, 357.)

3. DOGS—RIGHT TO KILL.—A statute which provides only for the killing of unlicensed dogs by a constable under a warrant, impliedly forbids such killing by any other person. (*Chapman v. Decrow*, 357.)

4. DOGS—RIGHT TO KILL—CONSTRUCTION OF STATUTE.—Under a statute providing "that any person may lawfully kill a dog found worrying, wounding, or killing any domestic animal outside the inclosure or immediate care of his owner," the dog must be caught at and engaged in the act denounced by the statute in order to justify killing it; and it is not enough to justify the killing that the dog may have worried or killed a domestic animal before, nor that there is a belief or apprehension that it intends to do so again, if it is not actually engaged in the act. (*Chapman v. Decrow*, 357.)

See Larceny, 1, 2.

APPEAL

1. APPEAL—FINDINGS OF FACT—CONCLUSIVENESS OF.—When issues of fact have been submitted to a court, and its finding is supported by evidence, it is conclusive on appeal. Hence, a finding, supported by evidence, that a newsboy on a railroad train was not killed while acting as a "lookout" thereon, at the instance of the railroad company will not be disturbed on appeal. (*Kansas City etc. R. R. Co. v. Southern Ry. etc. Co.*, 545.)

2. APPEAL—WEIGHING EVIDENCE TO SUPPORT VERDICT.—If there is sufficient legal evidence to sustain a verdict, it will not be disturbed on appeal, though the evidence is conflicting. (*Witte v. Koeppen*, 826.)

3. STARE DECISIS—SUBSEQUENT APPEAL.—If a case has been before the supreme court on an appeal involving the sufficiency of the complaint therein, the decision then made is binding, on a subsequent appeal, as to all questions covered by the former decision, leaving nothing which can be questioned except whether the facts then said to constitute a sufficient cause for equitable relief have been found to exist by the trial court, and whether any material part of such findings is against the clear preponderance of the evidence. (*Prieve v. Wisconsin etc. Co.*, 904.)

4. APPEAL—FACTS FOUND BY A REFEREE, based upon competent evidence and confirmed by the trial court, cannot be reviewed on appeal. (*Holt v. Couch*, 648.)

5. APPEALABLE ORDER—QUASHING INDICTMENT.—An order granting a motion to quash an indictment is a final order, and may be appealed from. (*State v. Bouknight*, 751.)

6. APPELLATE PRACTICE—NO PRESUMPTION OF ERROR.—If the record does not disclose the ground upon which a motion for the direction of a verdict in his favor was made or denied, the court's ruling thereon must be sustained if it was correct upon any ground. (*McClain v. Williams*, 791.)

7. APPELLATE COURT WILL NOT DIRECT JUDGMENT, WHEN.—In cases tried by a jury, an appellate court does not feel justified in directing the entry of any particular judgment. Hence, in an action of claim and delivery against a sheriff, who relies upon an execution, which has been excluded from evidence, and where judgment has been entered upon a verdict directed for the plaintiff, which is reversed on appeal upon the ground that the execution was improperly excluded, the appellate court will not direct a judgment for the defendant, but will remand the case for a new trial. (*McDonald v. Fuller*, 815.)

8. APPEAL—EXCESSIVE VERDICT—SETTING ASIDE.—An appellate court will not disturb a verdict in a suit to recover for personal injuries, unless it is so excessive as to justify an infer-

ence that it is the result of partiality, prejudice, or passion. (North Chicago St. R. R. Co. v. Zeiger, 157.)

9. APPEAL—FAILURE TO POINT OUT ERROR IN BRIEF. Error in giving or refusing instructions will not be considered on appeal when appellant's counsel fail to point out in their brief in what respect there was error. (Metropolitan Nat. Bank v. Merchants' Nat. Bank, 180.)

10. APPELLATE PRACTICE — DISMISSING BILL FOR WANT OF EQUITY.—Where a bill is sufficient on its face to sustain the contention of the complainant, and to entitle him to the relief prayed for, a decree dismissing the bill for want of equity should not be entered in favor of a defendant, who, by his default, has confessed the bill. (Harding v. American Glucose Co., 189.)

11. APPEAL—WHAT MAY BE CONSIDERED ON—WITHDRAWAL OF ANSWER.—Where testimony is taken on behalf of a complainant upon an issue of fact raised by a bill, answer, and replication, the supreme court may consider such testimony in passing upon the issues involved, though the answer has been withdrawn and a decree pro confesso has been entered against the defendants. (Harding v. American Glucose Co., 189.)

12. APPELLATE PRACTICE—AMENDMENT OF WRITS OF ERROR.—The supreme court will not exercise its discretion in favor of allowing appeals or writs of error to be amended for the purpose of bringing in omitted parties, when it is shown by the record that the time limited for taking appeals or writs of error has expired as to parties seeking to be brought in by such amendment. (Cornell v. Franklin, 131.)

13. APPELLATE PRACTICE—AMENDING WRITS OF ERROR.—If one against whom a judgment has been rendered jointly with another is not joined as a party plaintiff in a writ of error sued out from such judgment by his codefendant until after the expiration of the time limited for suing out writs of error, an amended writ of error bringing him in as a party plaintiff in error is, as to him, an entirely new writ, issued then, so far as he is concerned, for the first time, and as to him is a writ of error issued after the lapse of the time in which the law permits him to sue it out. The supreme court will not permit such an amendment. (Cornell v. Franklin, 131.)

14. APPELLATE PRACTICE—AMENDING WRITS OF ERROR.—The supreme court has discretionary power to permit writs of error to be amended by inserting therein the names of necessary parties who have been improperly omitted therefrom, and to strike out the names of parties who have been improperly included therein. Before the court can properly exercise such discretion in favor of having such an amendment made so as to bring into the writ new parties that have been omitted therefrom, the application therefor must be made before the time limited by law for suing out writs of error has expired. (Cornell v. Franklin, 131.)

15. APPEAL—WHO MAY PROSECUTE.—An administrator cannot appeal from a decree of the probate judge authorizing an action on his bond. He is not a person "aggrieved," in the statutory sense, nor is he thereby concluded from asserting or defending any claims of property rights in any proper court. (Sherer v. Sherer, 339.)

16. APPEAL BONDS—RIGHT OF SURETIES.—Stay of execution being a consideration of great value, sureties who execute an undertaking therefor have a right to rely upon the letter of their bond, and to stand upon the entirety of the expressed consideration

therein, and their liability cannot be extended by implication. (State v. Sixth Judicial Dist. Court, 618.)

17. APPEAL—STAY BONDS—JUSTIFICATION OF SURETIES.—The statute requiring a justification of sureties on a stay bond is directory and is meant to be for the respondent's, and not appellant's benefit, and may be waived by the former. (State v. Sixth Judicial Dist. Court, 618.)

18. APPEAL—STAY BONDS—RELEASE OF SURETIES. Sureties who execute a stay bond in consideration of stay of execution pending the determination of an appeal are released from liability to pay the judgment appealed from upon its affirmance by levy and sale under execution of the property of the judgment debtor before the appeal is determined, although such sureties have failed to justify on the bond as required by statute, after exception to their sufficiency has been made in due form. (State v. Sixth Judicial Dist. Court, 618.)

19. APPEAL—STAY BONDS—RELEASE OF SURETIES.—The sureties on a stay bond on appeal are released from liability if execution is issued on the judgment and levied before the determination of the appeal, notwithstanding the stay, and the fact that sale under the execution is prevented by an injunction to which the sureties are not parties is immaterial, and does not affect their liability thus released. (State v. Sixth Judicial Dist. Court, 618.)

20. APPEAL—STAY BONDS—RELEASE OF SURETIES—CERTIORARI.—The action of the trial court in entering judgment against sureties on a stay bond on appeal after the property of the judgment debtor has been levied upon and sold under execution before the determination of the appeal, whereby the sureties are released from liability, is in excess of jurisdiction, and may be reviewed on certiorari. (State v. Sixth Judicial Dist. Court, 618.)

21. APPEAL BONDS—CONSIDERATION.—If an appeal bond is given to obtain a stay of proceedings pending the appeal, such stay is a sufficient consideration for the bond. (Whereatt v. Ellis, 865.)

22. APPEAL BONDS.—A bond on appeal from an intermediate order given as terms of a stay of proceedings pending the appeal and conditioned for the payment by the party appealing of any judgment finally recovered, in an action, refers to such judgment as may finally be recovered in that action in the trial court. (Whereatt v. Ellis, 865.)

23. APPEAL BONDS—LIABILITY OF SURETIES—DISCHARGE OF PRINCIPAL.—If an appeal bond is conditioned to pay any judgment finally recovered in the action, the regular recovery of a judgment therein and the failure of the appellant to pay it render the sureties on the bond liable, although the principal may have been previously discharged from his liabilities under insolvent laws. (Whereatt v. Ellis, 865.)

See Instructions, 3.

APPROPRIATIONS.

See Statutes, 1-4.

ARBITRATION.

ARBITRATION.—THE DECISION OF AN UMPIRE can only be impeached for fraud or such gross mistake as would imply bad faith or a failure to exercise an honest judgment. (Vega Steamship Co. v. Consolidated Elev. Co., 484.)

See Insurance, 7-13.

ARREST.

ARREST—WARRANT FOR SUFFICIENCY.—An affidavit upon which a warrant for arrest is based, and the warrant therefor, are in contemplation of law one; and if one is referred to in the other, and if together they constitute a charge of a criminal offense, it is sufficient to resist a motion in arrest of judgment. (State v. Sharp, 663.)

ASSESSMENTS.

See Municipal Corporations, 1.

ASSIGNMENT.

See Negotiable Instruments, 4; Vendor and Purchaser, 2.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—AN ASSIGNEE for the benefit of creditors stands in no better position than his assignor, the insolvent debtor, and a defense against the latter is a defense against the former, except so far as his rights and powers are changed by statute. (Dickson v. Kittson, 447.)

ATTACHMENT.

1. ATTACHMENT — UNRECORDED CONVEYANCE.—A conveyance is void, as against attaching and judgment creditors, only when the attachment or judgment is against the person in whose name the title to the land appears of record. Hence, where a judgment creditor attaches land to which the judgment debtor never had any title of record, his only interest being under a contract of purchase which had been previously assigned, the judgment creditor acquires no interest as against the assignee of the contract of purchase. (Lyman v. Gaar, 452.)

2. ATTACHMENT—RETURN OF, WHEN NOT A DEFENSE IN REPLEVIN AGAINST OFFICER.—In an action against a sheriff to recover property seized and detained by him under a warrant of attachment, the officer's return is no defense, where it was not made within the time prescribed by statute. (Carson v. Fuller, 823.)

3. GARNISHEE—EXEMPTION, RIGHT TO CLAIM AFTER DEFAULT.—Under a statute which provides that, if a garnishee "fails to appear and answer, the plaintiff may proceed against him in an action in his own name," the only effect of the garnishee's default is to lay the foundation for an action wherein his rights must be determined. His failure to answer the garnishment summons does not preclude him from setting up the principal defendant's right of exemption to money garnished, and, if he paid it to the defendant after garnishment, he may justify such payment on the ground that the defendant claimed the money to be exempt, where such claim was, in fact, timely made. (Black Hills etc. Co. v. Mitchell, 830.)

See Insolvency.

ATTORNEY AND CLIENT.

1. ATTORNEY AND CLIENT—ATTORNEY'S LIEN.—In a suit to declare and enforce an attorney's lien for a fee for services rendered in a certain suit, on property which is received as a result of that suit, it is error to include in the judgment a fee for services rendered in a different suit. (Davis v. Webber, 81.)

2. ATTORNEY AND CLIENT—CONTRACT FOR CONTINGENT FEE—CHAMPERTY.—A contract between an attorney and client allowing the former a contingent interest in the subject matter of litigation as compensation for his professional services is valid, and not champertous, unless some unfair advantage is taken of the client. (Davis v. Webber, 81.)

3. ATTORNEY AND CLIENT—VALIDITY OF AGREEMENT OF CLIENT NOT TO SETTLE LITIGATION.—A provision in a contract between attorney and client preventing the client from settling the controversy without the consent of the attorney, if it furnishes an inducement for entering into the contract, renders the whole contract void. (Davis v. Webber, 81.)

4. ATTORNEY AND CLIENT—AMOUNT OF FEE UNDER VOID CONTRACT.—If a contract between attorney and client is void because of a stipulation that the client shall not settle or compromise the controversy without the attorney's consent, the court may grant compensation for the attorney's services under the rule of the quantum meruit, and may look to such contract to ascertain what the parties themselves think such services are reasonably worth. (Davis v. Webber, 81.)

5. ATTORNEY AND CLIENT—INTEREST OF ATTORNEY IN JUDGMENT.—If a suit has progressed to judgment, an attorney may establish his interest in such judgment resulting from his services, and this neither party to the litigation can ignore. They may settle if they wish, but before there can be any satisfaction of the judgment, the attorney's fee must be paid. (Davis v. Webber, 81.)

6. ATTORNEY AND CLIENT—COMPENSATION, HOW DETERMINED.—The professional standing of an attorney, the amount of his professional business, and the nature and importance of the controversy in which the services are rendered, must all be considered in fixing the value of such services. (Davis v. Webber, 81.)

ATTORNEYS' FEES.

See Attorney and Client, 2, 4, 6; Negotiable Instruments, 3, 5; Wills, 15, 16, 18.

BANKS AND BANKING.

1. BANKS AND BANKING—POWERS.—A banking corporation has no power to purchase the plants and properties of manufacturing corporations, and option contracts, providing for the sale of such properties to a bank, are void. (Harding v. American Glucose Co., 189.)

2. BANKS—OVERPAYMENT OF DRAFT—RECOVERY.—Where one bank pays to another the amount of a fraudulently altered draft, the former may recover the overpayment from the latter, notwithstanding the latter may have given credit on its books to the drawer of the full amount of the draft. (Metropolitan Nat. Bank v. Merchants' Nat. Bank, 180.)

3. BANKS—OVERPAYMENT OF DRAFT—RECOVERY—TENDER.—After a formal demand for repayment has been made by a drawee bank which has paid a fraudulently altered draft, and the payee has refused to pay, no tender of the draft is necessary before bringing suit to recover the amount of the overpayment. (Metropolitan Nat. Bank v. Merchants' Nat. Bank, 180.)

4. BANKS—RECOVERING MONEY PAID ON DRAFT FRAUDULENTLY ALTERED.—Money which has been paid by a bank upon a draft or check fraudulently raised or altered may be

recovered from the party to whom it was paid, on the ground that the payment was without consideration and made by mistake. (*Metropolitan Nat. Bank v. Merchants' Nat. Bank*, 180.)

5. **BANKS—LIABILITY FOR RECEIVING MONEY ON FRAUDULENTLY ALTERED CHECK.**—When one has received money as agent of another who had no right thereto and has not paid it over, an action may be sustained against the agent to recover the money. Hence a bank which receives for deposit a check fraudulently altered, and which receives payment from the drawee bank, the amount being credited to the indorser without paying it over, is liable to the drawee bank for the overpayment after demand is made therefor. (*Metropolitan Nat. Bank v. Merchants' Nat. Bank*, 180.)

6. **BANKS—RECEIVING CHECK FOR DEPOSIT.**—When a bank receives from a customer a check on another bank indorsed "for deposit," the bank is more than a mere agent to collect, and has authority to use the check in such manner as may make it most available to its protection, and it may have the check certified by the bank on which it is drawn. (*Metropolitan Nat. Bank v. Merchants' Nat. Bank*, 180.)

7. **BANKS—CERTIFICATION OF CHECK—EVIDENCE OF LOCAL USAGE.**—Evidence is inadmissible to prove that a contract of certification had, by local usage or the understanding of bankers and merchants, a larger scope and meaning than it had by settled legal construction. (*Metropolitan Nat. Bank v. Merchants' Nat. Bank*, 180.)

8. **BANKS—CERTIFIED CHECK—MONEY PAID ON FRAUDULENTLY ALTERED.**—Certification by a bank of a check which has been fraudulently altered does not preclude it from showing the fact of such alteration, nor prevent a recovery from the party who received the check on the faith of the certification alone. (*Metropolitan Nat. Bank v. Merchants' Nat. Bank*, 180.)

9. **BANKS AND BANKING—FORGED CHECKS—DUTY OF DEPOSITOR.**—If, in an action by a depositor to recover of a bank money alleged to have been paid on forged checks, it appears that the forgeries were made by a confidential clerk of the depositor, who intrusted him with the balancing of his bank and account books, and that the bank was not negligent in honoring the checks, the depositor cannot recover of the bank. He alone is responsible for his failure to examine the checks after payment and reject them within a reasonable time. (*Meyers v. Southwestern Nat. Bank*, 672.)

10. **BANKS—COLLECTIONS—RECEIVING CHECK AS PAYMENT.**—When a bank, authorized to collect a draft for another bank, accepts a check in payment and surrenders the draft, it makes the check its own, and its liability to the bank in whose favor the draft was drawn becomes fixed as much as if it had received cash instead of the check. (*National Bank v. American Exch. Bank*, 527.)

11. **BANKS—COLLECTIONS—CHECK AS PAYMENT—RECOVERY OF REMITTANCE BECAUSE OF MISTAKE OF FACT.**—When a bank, authorized to collect a draft for another bank, accepts a check in payment, its mistake as to the solvency of the drawer of the check and his ability to pay it is not such a mistake of fact as will entitle the collecting bank to recover the amount of a remittance by it in payment of the draft. (*National Bank v. American Exch. Bank*, 527.)

12. **BANKS—COLLECTIONS, WHAT MAY BE.**—A bank authorized to collect a draft for another bank has no implied power to re-

ceive anything except money in payment. Hence, if it accepts a check, it assumes the risk of its payment, though it has put it in the clearing-house for collection, and is answerable to the bank sending the draft for the amount of the check with interest from the date of its receipt. (*National Bank v. American Exch. Bank*, 527.)

13. **BANKS — COLLECTIONS — RECEIVING WORTHLESS CHECK AS PAYMENT—RECOVERY OF REMITTANCE—CUSTOM—LOSS—MISTAKE.**—If a bank, authorized to collect a draft for another bank, accepts a check in payment, and remits the amount of the draft to the bank which sent it, supposing the check to be good and that it would be paid upon presentation in the usual course of business, but sues its principal for the amount of the remittance, after finding out that the check is worthless, it is no ground for recovery that the transaction was in accordance with the usual and customary way of doing such business, or that neither the bank sending the draft nor the one in whose favor it was drawn sustained any damage by the acceptance of the check; or that the collecting bank received the check and paid the draft by mistake as to the solvency of the drawer of the check, and his ability to pay it. (*National Bank v. American Exch. Bank*, 527.)

14. **THE TRUSTEES OF A SAVINGS BANK** occupy a fiduciary relation to its depositors in respect both to the investment of deposits and to the election of other trustees. (*Dickson v. Kittson*, 447.)

15. **SAVINGS BANKS—AGREEMENT TO ELECT TRUSTEE—ILLEGAL CONSIDERATION.**—An agreement with a trustee of a savings bank, upon a consideration moving to him for his private benefit, to secure the election of certain persons as trustees is illegal as against public policy, and a note given for such a promise is void. (*Dickson v. Kittson*, 447.)

BETTERMENTS.

See Cotenancy, 1.

BIGAMY.

BIGAMY—DEFENSE.—The fact that a person honestly believes that he has been divorced from his first wife before marrying again is no defense to a prosecution for bigamy, but evidence of such fact is admissible in mitigation of punishment. (*Russell v. State*, 78.)

BILLS OF LADING.

BILL OF LADING—CARRIER AS INSURER.—A provision in a bill of lading that all the deficiency in a cargo of wheat shall be paid by the carrier and deducted from the freight, makes the carrier an insurer that the amount of wheat called for had been delivered to it, and would be redelivered at the end of the route. (*Vega Steamship Co. v. Consolidated Elev. Co.*, 484.)

BONDS.

1. **BONDS—SIGNATURE OF PRINCIPAL.**—It is immaterial where the signature of a party to a bond is placed. It is as binding if found anywhere else upon the paper as it is when appearing at the end provided that such party intended to be bound by his signature so placed. (*Kenck v. Parchen*, 625.)

2. **BONDS—AMOUNT RECOVERABLE.**—In an action on a penal bond, the amount recoverable is not limited by the penalty.

It may also include damages in excess of the penalty, with interest. (*Whereatt v. Ellis*, 865.)

See Appeal, 16-23.

BOYCOTTS.

1. **BOYCOTT IS A COMBINATION OF MANY** to cause a loss to one person by coercing others against their will to withhold from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them. (*Beck v. Railway etc. Union*, 421.)

2. **BOYCOTTS WITHOUT THREATS OF VIOLENCE.**—Unlawful boycotts are not alone those accompanied by violence or threats of violence, but when the means employed are threatening in their nature, and intended and naturally tend to overcome, by fear of loss of property, the will of others, and compel them to do things which they would not otherwise do, the boycott is equally unlawful. (*Beck v. Railway etc. Union*, 421.)

3. **BOYCOTTS—CIRCULARS—INJUNCTION—LIBEL.**—An injunction against the circulation of false boycotting circulars intended to intimidate employes and customers of the complainant may be granted, although their publication as a libel would not be enjoined. (*Beck v. Railway etc. Union*, 421.)

4. **BOYCOTTS.—PICKETING THE PREMISES OF THE COMPLAINANT** in order to intercept his employes or to prevent persons from going there to trade is an unlawful act of intimidation and coercion, which may be enjoined. (*Beck v. Railway etc. Union*, 421.)

See Injunctions, 2, 3.

BROKERS.

1. **BROKERS—CUSTOM OF MARKET.**—One who employs a broker to operate in stocks for him must be presumed to give him authority to act as other brokers do, and, in the execution of his orders, to follow the rules and usages of the stock exchange, and the principal is bound by the custom of the business, whether he is familiar therewith or not. (*Van Duzen-Harrington Co. v. Jungeblut*, 463.)

2. **BROKERS—CUSTOM—SALE AND PURCHASE BY CORPORATION WITH SAME OFFICERS.**—Where a broker, according to a custom of a stock exchange, has a right, on the failure of a customer to pay margins, to close out the deal by selling it on the floor of the exchange, the mere fact that the deal was purchased by another corporation, some of whose officers were officers of the corporation acting as broker, does not avoid the sale in the absence of any showing that the purchaser suffered some prejudice or injury by such relation. (*Van Duzen-Harrington Co. v. Jungeblut*, 463.)

3. **BROKERS—AUTHORITY TO ADVANCE MONEY.**—Where one authorizes a broker to purchase wheat for him, and upon being told of the purchase and requested to send his check remits a deposit, and later puts up additional margins without being asked for them upon discovering that his margins were exhausted, this indicates such a course of dealing as to give the broker implied authority to advance money to pay the person's margins and continue the deal for him. (*Van Duzen-Harrington Co. v. Jungeblut*, 463.)

BURGLARY.

BURGLARY.—IN INDICTMENTS for burglary with intent to commit larceny, it is not necessary to specify the particular

goods and chattels the defendant intended to steal. (*State v. Langford*, 746.)

CARRIERS.

CARRIERS—SUBROGATION TO CONSIGNEE'S RIGHTS.—A carrier, who has paid the consignee for a deficiency in the quantity of wheat delivered to it by the owner of a grain elevator, is subrogated to any right of action which the consignee may have had against the owner of the elevator by reason of such deficiency. (*Vega Steamship Co. v. Consolidated Elev. Co.*, 484.)

See **Bills of Lading; Chattel Mortgages**, 2.

CERTIFICATES OF DEPOSIT.

See **Setoff**, 2, 3.

CERTIORARI.

CERTIORARI—WHAT REVIEWED ON.—On a common-law certiorari, the court can review proceedings of a justice of the peace only so far as they relate to jurisdictional questions shown by the pleadings and docket entries. It cannot consider questions of law arising upon such entries, or any question which involves an inquiry into the evidence. Hence, if such justice adjourns the case, or enters judgment contrary to a stipulation of the parties, it is an error of law that cannot be reached by certiorari. (*Fulton v. State*, 854.)

See **Appeal**, 20.

CHAMPERTY.

See **Attorney and Client**, 2.

CHATTEL MORTGAGES.

1. CHATTEL MORTGAGES—ALLOWING MORTGAGOR TO REMAIN IN POSSESSION.—The fact that a chattel mortgagor is permitted to remain in possession of the property, such as a "merry-go-round," and to move it from place to place, for use within the state, is not equivalent to consent, upon the part of the mortgagee, that the lien of a carrier for transporting the property shall be paramount to the lien of the mortgage. (*Owen v. Burlington etc. R. R. Co.*, 786.)

2. LIENS—PRIORITY OF CHATTEL MORTGAGE OVER CARRIER'S LIEN.—The lien of a chattel mortgage has priority to that arising in favor of a common carrier for freight subsequently earned. (*Owen v. Burlington etc. R. R. Co.*, 786.)

CHECKS.

See **Banks**, 5-13; **Negotiable Instruments**.

CLOUD ON TITLE.

See **Homesteads**, 6.

COLLATERAL ATTACK.

See **Judicial Sales**.

COLLECTIONS.

See **Banks and Banking**, 11-13.

COMPROMISE.

See Counties; Mistake, 2.

CONDITIONS SUBSEQUENT.

See Pleading, 11; Vendor and Purchaser, 6.

CONFLICT OF LAWS.

CONFLICT OF LAWS—CONSTRUCTION OF CONTRACTS.

The law of the state in which a contract for the transportation of passengers, as well as livestock and merchandise, was made, is controlling, unless it appears that it was the intention of the parties to be bound by the law of some other state, although one of the parties was, at the time of its execution, a resident of another state than the one in which it was made. (*Meuer v. Chicago etc. Ry. Co.*, 774.)

See Limitation of Actions, 3, 4.

CONSPIRACY.

1. CONSPIRACIES—DECLARATIONS OF CONSPIRATOR.—

Every act and declaration of each conspirator to commit a crime in pursuance of the original concerted design, and with reference to the common object, done or made during the pendency of the criminal enterprise, is considered the act or declaration of all of them, and is original evidence against each of them. (*Mercer v. State*, 135.)

2. FRAUD—CONSPIRACY—LIABILITY.—Persons who, in pursuance of a conspiracy to defraud, create a corporation of which they gain control, and, while acting ostensibly in its interests, carry out the fraudulent scheme, and absorb its assets for their own private benefit, are all equally liable to make good the loss, without reference to the proportion of the fruits of the fraud, which each receives. (*Zinc Carbonate Co. v. First Nat. Bank*, 845.)

See Corporations, 10.

CONTRACTS.

1. CONTRACTS.—THE STATUTE OF FRAUDS has no application to executed, but to executory, contracts. (*Merrell v. Witherby*, 39.)

2. STATUTE OF FRAUDS—CONTRACT TO PAY DEBT OF ANOTHER—WHAT NOT.—Where a contract is founded upon a distinct consideration and is intended to create a debt against the party himself, the agreement is not within the statute of frauds, though the effect of the payment is to pay the debt of another. (*Merrell v. Witherby*, 39.)

3. CONTRACTS—UNCERTAINTY.—A contract for the sale of stock whereby the seller agrees that all debts of the company shall be paid on the day of the transfer, and the purchaser is to retain sufficient of the price to assure him that the company is free from debt, is not void for uncertainty in not stating such debts, if the amount to be paid is fixed and definite. (*Northern Cent. Ry. Co. v. Walworth*, 683.)

4. CONTRACTS RELATING TO LAND.—The validity of all transactions relating to land depends upon the laws of the state where the land is situated. (*Harding v. American Glucose Co.*, 189.)

5. CONTRACTS IN TOTAL RESTRAINT OF TRADE are void; but contracts in restraint of trade are valid, and will be enforced, where the restraint is reasonable, partial, and founded upon a good consideration. (*Harding v. American Glucose Co.*, 189.)

6. CONTRACTS.—FORFEITURES are not favored either in equity or in law; consequently, provisions for forfeiture are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced. (*Forest City Ins. Co. v. Hardesty*, 161.)

7. CONTRACTS — ILLEGAL COMBINATION — NECESSITY FOR WRITING.—An agreement for an illegal combination may be a verbal agreement or understanding, or a scheme not embodied in writing, but evidenced by the action of the parties. (*Harding v. American Glucose Co.*, 189.)

8. CONTRACTS, GAMBLING—DEALING IN WHEAT.—In an action against a telegraph company to recover for its failure to deliver a message from a customer to his broker to buy him a certain amount of future wheat, which he testifies that he expected to actually receive and pay for, the transaction cannot be held, as a matter of law, to be void as involving a gambling contract. (*Carland v. Western Union Tel. Co.*, 394.)

9. CONTRACTS TO AID UNLAWFUL ACTS OF A THIRD PERSON ARE ILLEGAL.—A contract lawful in itself cannot be rendered unlawful by the act of a third person converting the subject of the contract to an unlawful purpose, but if a contract, apparently lawful, is made with a view of facilitating or encouraging the unlawful act of a third person, it is unlawful. It is not the unlawful use to which the subject of the contract is liable to be put, but the intention of the parties that it be so used which vitiates the contract. (*St. Louis Fair Assn. v. Carmody*, 571.)

10. CONTRACTS DESIGNED TO PROMOTE A BUSINESS PARTLY UNLAWFUL ARE ILLEGAL.—If parties make a contract in contemplation of a business which one of them is to conduct, part of it being lawful and the other part unlawful, and the subject of the contract is a feature of the business, and designed to promote it, the contract is unlawful. (*St. Louis Fair Assn. v. Carmody*, 571.)

11. CONTRACTS TO FURNISH REFRESHMENTS AT GRAND STAND ON RACECOURSE, WHEN ILLEGAL.—While it is lawful for a racetrack association to keep a racetrack and grand stand, yet, if it adds to these an unlawful business, such as gambling booths, which form a part of the racetrack scheme, where books are made and pools are sold upon the races, from which the association derives a revenue for bookmaking, and the unlawful branch of the business is conducted together with the lawful branch of it, a contract whereby the association sells the privilege of furnishing cigars, liquors, and other refreshments in and about its grand stand, is founded upon an unlawful consideration, is against public policy, and is invalid, where the object of providing the refreshments is in aid of the racetrack scheme. (*St. Louis Fair Assn. v. Carmody*, 571.)

12. CONTRACTS TO FURTHER PURPOSE OF GAMBLING HOUSE ARE ILLEGAL AND NOT ENFORCEABLE.—Any contract made in furtherance of the purpose for which a gambling house is kept, or to render it more tempting or attractive to the public, who would patronize it for that purpose, is illegal, and courts will not enforce it. (*St. Louis Fair Assn. v. Carmody*, 571.)

13. CONTRACTS — VALIDITY OF, HOW DETERMINED, WHERE BUSINESS IS PARTLY UNLAWFUL.—If the business of a racetrack proprietor has two branches, one lawful and the other unlawful, and the subject of a contract in suit, respecting the business, relates as well to one branch as to the other, a court, in determining the validity of the contract, will leave out of view

its relation to that part of the business which is lawful and consider it only in its relation to the unlawful branch. (*St. Louis Fair Assn. v. Carmody*, 571.)

See Attorney and Client, 2-4; Conflict of Laws; Judgments, 1-4; Mechanic's Lien, 1-6; Monopolies, 1; Specific Performance; Sunday, 1-2.

CONTRACTS OF INDEMNITY.

See Railroads, 10-13.

CONVERSION.

See Corporations, 4.

CORPORATIONS.

1. **CORPORATIONS — FORFEITURE OF CHARTER FOR FAILURE TO DISCHARGE PUBLIC DUTY.**—A public corporation, having the privilege of supplying a city with gas, impliedly agrees to carry out the purpose of its creation, and assumes obligations to the public which it must discharge. Hence, if it fails to discharge its corporate duties by an agreement detrimental to the public interests, such as one whereby it disables itself from furnishing gas to persons who are patrons of a competing company, such corporation offends against the law of its creation, forfeits any further right to exercise its franchise, and is subject to a judgment of ouster. (*State v. Portland Natural Gas etc. Co.*, 314.)

2. **CORPORATIONS—REGULATIONS — LICENSE TAX.**—An incorporated association that has laid out its land in streets, squares, and cottage lots and made perpetual leases of the lots to the occupants of the cottages, without other restriction than that they are subject to "such rules and regulations as the association may from time to time adopt," cannot subsequently, for revenue purposes, impose a license tax on persons visiting the occupants of the cottages to obtain orders for family supplies. (*Northport etc. Assn. v. Perkins*, 342.)

3. **CORPORATIONS—REGULATIONS.**—A corporation has no power to adopt rules or regulations injuriously affecting the rights of others under prior contracts, by annexing conditions not embraced in the contracts. (*Northport etc. Assn. v. Perkins*, 342.)

4. **CORPORATIONS — STOCK — PLEDGE — CONVERSION.**—A pledgee of corporate stock indorsed in blank may protect his special property therein by having the stock transferred on the books of the corporation and new stock issued in his name, but if he goes further and uses such stock as his own, denying the rights of the pledgor, he is guilty of a conversion. (*Feige v. Burt*, 390.)

5. **CORPORATIONS—PURCHASE OF STOCK OF ANOTHER CORPORATION.**—A contract for the purchase by a railroad company of the stock of another railway is not against public policy if the two roads are not parallel or competing lines, and such purchase is authorized by statute. (*Northern Cent. Ry. Co. v. Walworth*, 683.)

6. **CORPORATIONS — LIABILITY OF DIRECTORS FOR TORT.**—The liability of a director of a corporation in tort is not to be avoided by his "vicarious character," when the tort of the corporation has been committed through the directors. (*Cameron v. Kenyon-Connell Com. Co.*, 602.)

7. **CORPORATIONS—LIABILITY OF DIRECTORS IN TORT.** The directors of a corporation are personally responsible for the death of a person killed by an explosion of gunpowder unlawfully stored by the corporation, though they had no knowledge thereof,

17. by the exercise of ordinary care and diligence, they could have known that it was so stored, and the burden of proof is on them to show that, in the exercise of such care and diligence, they could not have discovered that the powder was unlawfully stored and kept. (*Cameron v. Kenyon-Connell Com. Co.*, 602.)

8. CORPORATIONS — LIABILITY OF DIRECTORS FOR TORT.—Third persons may hold directors of a corporation liable in positive tort, upon the principle that a positive wrong done by a servant or agent must be applied to the misfeasance of directors also. (*Cameron v. Kenyon-Connell Com. Co.*, 602.)

9. CORPORATIONS—STORING EXPLOSIVES—MUNICIPAL ORDINANCES.—An ordinance of a city cannot authorize a larger quantity of powder to be kept by a corporation within the city limits than the state statute allows, so as to exempt the corporation from liability, unless some special exemption exists, excepting the inhabitants of such city from the operation of the general statute. (*Cameron v. Kenyon-Connell Com. Co.*, 602.)

10. CORPORATIONS — CONSPIRACY — LIABILITY — COMPLAINT.—A corporation may be held liable as a party to a conspiracy to defraud, and in an action against it charging it with having conspired with codefendants to defraud in a transaction outside the scope of its charter, the complaint is not defective for want of averments that the corporate officers and agents were specially authorized to act as they did in behalf of the corporation. (*Zinc Carbonate Co. v. First Nat. Bank*, 845.)

11. CORPORATIONS—ULTRA VIRES—WHO MAY SET UP.—If a corporation transcends its powers, ordinarily it is for the state alone to call it to account. (*Zinc Carbonate Co. v. First Nat. Bank*, 845.)

12. CORPORATIONS—ULTRA VIRES AS DEFENSE.—A corporation cannot violate its charter for pecuniary gain and retain the benefit of its illegal conduct by asserting ultra vires as a defense. (*Zinc Carbonate Co. v. First Nat. Bank*, 845.)

13. CORPORATIONS—INSOLVENCY—PREFERENCES—OFF-SET.—A bank having on hand funds of an insolvent bank, about to go into the hands of a receiver, may apply such funds on an indebtedness due from the insolvent bank, although its own officers are de facto to the officers of the insolvent bank. (*Slack v. Northwestern Nat. Bank*, 841.)

14. CORPORATIONS—INSOLVENCY—RIGHT OF DIRECTORS TO PREFER THEMSELVES.—A bank whose officers are also the de facto managers of another bank, known by them to be on the verge of insolvency and about to go into the hands of a receiver, cannot retain, as against such receiver, assets of the insolvent bank taken from it as collateral security for the payment of its indebtedness to the other bank. (*Slack v. Northwestern Nat. Bank*, 841.)

15. CORPORATIONS—INSOLVENCY—RIGHT OF OFFICERS TO PREFER THEMSELVES.—If a corporation is insolvent and has ceased to be a going concern, and its officers know, or ought to know, that suspension is impending, they are then so far trustees that they cannot transfer the corporate property to themselves in payment of debts due them. Such a transfer attempted constitutes a fraud in law. (*Slack v. Northwestern Nat. Bank*, 841.)

16. CORPORATIONS—INSOLVENCY—RIGHT TO PREFER CREDITOR.—An insolvent corporation, while a going concern, may make a valid transfer of its property or collaterals to its creditor in payment of his debt, provided there is no actual fraud in the transaction. (*Slack v. Northwestern Nat. Bank*, 841.)

17. CORPORATIONS—PREFERENCES BY INSOLVENT.—The right of creditors to proceed by ordinary process of law against an insolvent corporation to collect their demands exists as fully as though the debtor were an individual instead of a corporation. (*Slack v. Northwestern Nat. Bank*, 841.)

18. CORPORATION—SALE OF PROPERTY AND FRANCHISES—INJUNCTION BY STOCKHOLDER.—A stockholder in a corporation may enjoin it from an attempt to abandon its business and sell its assets without a legal termination or dissolution of the corporation, even though such stockholder is to receive his proportionate share of the proceeds of the sale of the property, since he has a right to hold his investment in the form of stock, and a change of such investment against his consent is a change which affects his pecuniary or financial interests. (*Harding v. American Glucose Co.*, 189.)

19. CORPORATIONS—SUIT BY STOCKHOLDER.—Where the officers of a corporation wrongfully deal with its property to the injury of the stockholders, they may maintain a bill against the corporation and its officers for relief against such misappropriation. (*Harding v. American Glucose Co.*, 189.)

20. CORPORATIONS—POWERS—MEETING OUTSIDE THE STATE.—A corporation has no power to perform distinctly corporate acts, such as holding a stockholders' meeting, outside of the state of its creation. (*Harding v. American Glucose Co.*, 189.)

21. CORPORATIONS—FOREIGN—POWERS.—Foreign corporations do not come into a state as a matter of legal right, but only by comity, and such corporations are subject to the same restrictions and duties as domestic corporations, and have no other or greater powers. (*Harding v. American Glucose Co.*, 189.)

22. CORPORATIONS—INJUNCTION BY STOCKHOLDER—MONOPOLY CONTRACT.—Where a corporation enters into a contract which is illegal because it provides for a monopoly, a stockholder may enjoin the performance of such contract, since if carried out it may lead to a forfeiture of the charter of the corporation and its dissolution, which would result in wiping out the stock of the stockholder. (*Harding v. American Glucose Co.*, 189.)

See Brokers, 2; Executions, 1, 2; Fraudulent Conveyances, 3; Libel; Monopolies, 3-6; Pledge, 1, 2; Quo Warranto, 1, 2.

COSTS.

See Wills, 15-17.

COTENANCY.

1. COTENANCY—BETTERMENTS.—The term "betterments" has no application to cotenants, but is for the protection of a purchaser of land, who makes lasting improvements under the belief that he has a good title. (*Holt v. Couch*, 648.)

2. COTENANCY—POSSESSION—RIGHT OF AGAINST A STRANGER TO TITLE.—A tenant in common is entitled to the possession of the entire property as against all persons except his cotenant, and has a right, in ejectment, to recover the possession of the whole thereof as against one who has no title. (*Mather v. Dunn*, 788.)

3. COTENANCY.—ALL COTENANTS NEED NOT BE MADE PARTIES to an action by one of them to recover the common property, as they are not "united in interest." Their interests are several, and the possession of one is the possession of all. (*Mather v. Dunn*, 788.)

4. COTENANCY—EJECTMENT—JUDGMENT FOR POSSESSION OF ENTIRE PROPERTY.—A tenant in common, who brings an action to recover the possession of a mining claim, without making his cotenant a party, and who establishes title to three-fourths of the claim, his cotenant owning the other one-fourth, is entitled, as against the defendants, who do not claim to be his cotenants, to a judgment for the possession of the whole claim. (*Mather v. Dunn*, 788.)

See Husband and Wife, 1, 2; Marriage and Divorce, 2; Partition, 1-3.

COUNTIES.

COUNTIES—COMPROMISE OF DISPUTED CLAIM.—A BOARD OF COUNTY COMMISSIONERS has power to compromise a disputed claim that has been reduced to judgment. It may, therefore, pending an appeal, compromise a judgment obtained upon a forfeited undertaking in a criminal case, by the acceptance of less than the amount of the judgment. (*State v. Davis*, 780.)

See Executions, 8-10; Judgment, 8.

CRIMINAL LAW.

1. CRIMINAL LAW—CONCURRENT SENTENCES.—If it is not stated in either of two sentences imposed at the same time that one of them shall take effect at the expiration of the other, the two periods of time named in them run concurrently, and the two punishments are executed simultaneously. Upon the expiration of one of such periods of time the prisoner is entitled to his discharge upon habeas corpus. (*Breton, Petitioner*, 335.)

2. CRIMINAL LAW—INDETERMINATE SENTENCE ACT.—Under a statute which requires the jury, in a case of felony, to find and state whether or not the defendant is over sixteen years of age, and less than thirty years of age, it is not necessary to find his exact age. A verdict that he is guilty, and a finding that he is over sixteen years of age, and under thirty years of age, complies with the statute. (*Colip v. State*, 322.)

See Instructions, 4-6; Trial, 5-8.

CROSS-EXAMINATION.

See Witnesses, 11, 12.

CURATIVE ACTS.

See Statutes, 5.

CURTESY.

See Dower; Executions, 3, 4; Homesteads, 5.

CUSTOM.

See Banks, 7, 13; Brokers, 1, 2.

DAMAGES.

1. DAMAGES FOR NEGLIGENCE CAUSING DEATH—WHEN NOT EXCESSIVE.—In an action to recover for the death of the plaintiff's intestate caused by alleged negligence, a verdict for five thousand dollars is not excessive where the evidence shows that the decedent, at the time of his death, was fifty years of age, and in good health; that he had been in the United

States postal service seventeen or eighteen years, receiving a salary of eleven hundred and fifty dollars per annum; that he left a widow and two sons, aged nineteen and fourteen respectively, dependent upon him for support; and that his expectancy of life was almost twenty-one years. (*Malott v. Shimer*, 278.)

2. DAMAGES FOR PERSONAL INJURIES—PROCURING HELP IN BUSINESS.—Where a plaintiff has been injured through the negligence of a street-car company, the expense necessary in procuring competent help in his business to do the work which would have been performed by himself had he not been disabled is a proper subject of allowance for damages, if pleaded. (*North Chicago St. R. R. Co. v. Zeiger*, 157.)

3. DAMAGES—INSTRUCTIONS—INVADING PROVINCE OF JURY.—An instruction that if the jury find from a preponderance of the evidence that plaintiff is entitled to recover substantial damages, they "will" fix the amount thereof, is correct; the word "will" is not coercive, does not tend to deprive the jury of their freedom of action in the matter, and is not an invasion by the court of the province of the jury. (*North Chicago St. R. R. Co. v. Zeiger*, 157.)

See Injunctions, 1; Libel, 1-4; Mistake, 3; Suretyship, 7, 8; Telegraph Companies, 5; Waters and Watercourses, 3.

DEATH.

See Damages, 1; Negligence, 1-4; Railroads, 5.

DEEDS

1. DEEDS—ESSENTIALS.—A deed to be valid on its face, requires not only a grantor and a grantee, but also a thing granted, and, if the description is too indefinite to convey anything, then the paper on its face lacks one of the essential elements of a conveyance. A deed cannot be color of title to land in general, but must attach to some particular tract. (*Barker v. Southern Ry. Co.*, 658.)

2. DEEDS—DEFECTIVE DESCRIPTION—ACTS OF GRANTOR TO AID.—If the description in a deed is too vague to be located by extrinsic evidence, it may, in fact, be located by the grantor himself, and he may be estopped from denying his acts, if, at the time of the conveyance he has the land surveyed and places the grantee in actual possession, under designated lines and marked corners. (*Barker v. Southern Ry. Co.*, 658.)

3. DEEDS—DELIVERY.—If the delivery of a deed is not absolute, or unconditional so as to be beyond the grantor's control, the depositary being a mere agent, and the instrument revocable at any time before the grantor's death, there is no valid delivery thereof to the grantee and the deed is a nullity. (*Williams v. Daubner*, 902.)

4. DEEDS—DELIVERY.—If a grantor executes a deed and delivers it to a person other than the grantee to hold, upon the understanding that if she recovers from her present sickness she is to have the deed back, and if not it is to be delivered to the grantee named, and such depositary retains the deed until the grantor's death, there has not been, and thereafter cannot be, a valid delivery to the grantee, and such deed is a nullity. (*Williams v. Daubner*, 902.)

See Husband and Wife, 4.

DEFINITIONS.

"Gambling house." (*St. Louis Fair Assn. v. Carmody*, 571.)

"Mistake." (*Kowalke v. Milwaukee etc. R. R. Co.*, 877.)

"Railroad cars." (*Benson v. Chicago etc. R. R. Co.*, 444.)

DEMURRER TO EVIDENCE.

See Trial, 1.

DETINUE.

1. **DETINUE—SEIZURE OF PROPERTY.—A PLEA OF JUSTIFICATION** under legal process must set forth matter which, if proved would constitute a full defense to the action. (*West v. Hayes*, 24.)

2. **DETINUE—LIABILITY OF OFFICER WHO FAILS TO RETURN PROPERTY TO DEFENDANT.**—The duty of an officer who has taken property into possession under a writ of detinue to return it to defendant, if he gives the required bond within five days after seizure, or where such bond is not given, upon failure of the plaintiff to give the bond as provided by statute, is imperative, and his failure to do so is an official misfeasance, for the damages resulting from which he and the sureties upon his official bond are liable. (*Elrod v. Hamner*, 43.)

3. **DETINUE—LIABILITY OF OFFICER—NECESSITY OF DEMAND FOR RETURN OF PROPERTY.**—Under a statute requiring that if the plaintiff fails to give a bond within a prescribed time, the property which has been seized by an officer under a writ of detinue must be returned to the defendant, it is not necessary that the defendant should demand of such officer the delivery of the property, in order to render him liable to the defendant for his failure to return it. (*Elrod v. Hamner*, 43.)

4. **DETINUE—ACTION AGAINST OFFICER FOR FAILURE TO RETURN PROPERTY—PLEADING.**—In an action against an officer for failure to return to the defendant in a detinue suit the property seized, an averment that "the plaintiff tendered a proper forthcoming bond to said constable as provided [by statute]" is a sufficient allegation that the forthcoming bond was for the proper amount, with sufficient surety and conditioned as provided by the statute. (*Elrod v. Hamner*, 43.)

5. **DETINUE—LIABILITY OF OFFICER—DEFENSE OF NO TITLE IN DEFENDANT.**—In an action against an officer for his failure to return to the defendant property seized under a writ of detinue, the officer cannot set up as a defense to the action, or in mitigation of damages, that the defendant did not own the property, or that he had only a qualified interest therein. (*Elrod v. Hamner*, 43.)

6. **DETINUE—ACTION AGAINST OFFICER—PLEADING.**—Where a statute requires an officer to return to the defendant property seized under a writ of detinue if the plaintiff fails to give a forthcoming bond as provided by statute, such defendant, in an action against the officer for failing to return the property, is only required to aver a failure of the plaintiff in the detinue suit to give the proper forthcoming bond, and need not aver that the defendant himself gave a bond to the officer as required by statute. (*Elrod v. Hamner*, 43.)

See Executions, 14; Trespass, 5.

DEVISE.

1. **WILLS.—REMAINDERS** are not to be considered as contingent, in construing wills, in any case where, consistently with the intention of the testator, they may be construed as being vested. (*Patton v. Ludington*, 910.)

2. **WILLS—CONSTRUCTION—REMAINDERS, WHEN VEST.** The direction in a will for the trustees to pay over or distribute

the net income of the estate or a portion thereof annually, or at other stated periods, to the beneficiaries, is evidence of an intent on the part of the testator to vest the equitable estate in them immediately upon the death of the testator. (*Patton v. Ludington*, 910.)

3. **WILLS—CONSTRUCTION—REMAINDERS, WHEN VEST.** If an estate is bequeathed to executors in trust to collect the rents, issues, and profits during the life of the widow of the testator, and to pay over to her annually a certain part thereof and the balance thereof to be paid over and distributed semi-annually among all of the testator's children living at the time of his death, equally, share and share alike, and upon the death of the widow to divide the corpus of the estate equally among all of his children, share and share alike, such estate becomes vested in such children immediately upon the death of the testator, subject to the execution of the trust; and such an estate satisfies a statute which declares in effect that future estates are vested when there is a person in being who would have an immediate right to the possession of the estate upon the ceasing of the intermediate or precedent estate. (*Patton v. Ludington*, 910.)

4. **WILLS—CONSTRUCTION—REMAINDERS.**—If an estate is devised in trust to provide an income for life beneficiaries, and at their death to divide among remaindermen as to whom there is no uncertainty, the trust estate vests in the trustees, not absolutely, but subject to the remainder over on the termination of the trust, and the remainder does not vest in the trustees at all. (*Patton v. Ludington*, 910.)

5. **WILLS—DEVISE IN FEE.**—A will devising the use of a farm to "C. during his life, and to his heirs to the third generation the same use; then the property to be sold and divided equal among the heirs of C.," evinces an intention on the part of the testator that the property should go to C. and his heirs, and C. takes the estate in fee. (*Stigers v. Dinsmore*, 702.)

See Wills.

DISCOUNT.

See Negotiable Instruments, 2.

DISPENSARY LAW.

See Intoxicating Liquors, 1.

DOGS.

See Animals, 1-4; Larceny, 1, 2.

DOWER.

STATUTORY DOWER AND CURTESY—WHEN SUBJECT TO PAYMENT OF DEBTS OF DECEASED SPOUSE.—In order to subject the statutory interest of a surviving spouse in the real estate of the deceased spouse to the payment of the debts of the latter, it must be done in the administration proceedings in the probate court. (*Johnson v. Minnesota Loan etc. Co.*, 438.)

See Executions, 3.

DRAFTS.

See Banks and Banking, 2-4.

EASEMENTS.

FENCE OBSTRUCTING LIGHT AND AIR.—The owner of property has a right to shut off air and light from his neighbor's

windows by building a high fence or other structure on his own lots. It makes no difference whether his motive is malice toward his neighbor, or a desire to improve or ornament his property. (*Bordeaux v. Greene*, 600.)

EJECTMENT.

See Cotenancy, 4.

ELECTIONS.

1. **CONVENTIONS, POLITICAL.**—If rival factions of a regularly called convention of a party nominate and certify different tickets, neither the election commissioners nor the courts have authority to determine that the candidates of one or the other of the two factions are regularly nominated and entitled to a place upon the ballot to the exclusion of the other, unless such authority is conferred by statute expressly, or by necessary implication. (*Stephenson v. Boards of Election Commrs.*, 402.)

2. **CONVENTIONS, POLITICAL—TEMPORARY ORGANIZATION.**—A chairman of a political committee, who calls a convention to order, has no power to determine the right of contesting delegates to vote on the organization of the convention against the will of the assembly, although he is acting under direction of a majority of the committee of which he is chairman. (*Stephenson v. Boards of Election Commrs.*, 402.)

3. **CONVENTIONS, POLITICAL — QUALIFICATIONS OF MEMBERS.**—A political convention is the sole judge of the qualifications of its members, and its decision is final. (*Stephenson v. Boards of Election Commrs.*, 402.)

4. **ELECTIONS—TICKETS OF RIVAL FACTIONS.**—Both tickets nominated and certified by rival factions of a regularly called political convention are entitled to a place on the official ballot in separate columns, one with the general ticket and the other in the next column under the party name and vignette. The election commissioners may decide the set of nominees to occupy the different columns. (*Stephenson v. Boards of Election Commrs.*, 402.)

ELEVATORS.

CONSTITUTIONAL LAW — ELEVATORS WEIGHING GRAIN.—The business of handling grain in elevators is affected with a public interest and may be regulated by the legislature. Hence, the legislature may provide that the act of a weighmaster in weighing grain can be impeached only when the party complaining was himself free from fault or negligence, and when it is demonstrated by clear, strong, and satisfactory evidence that there was in fact a substantial mistake in the weighing. (*Vega Steamship Co. v. Consolidated Elev. Co.*, 484.)

See Statutes, 9.

EMBEZZLEMENT.

See Larceny, 6.

EMINENT DOMAIN.

EMINENT DOMAIN—TAKING OF PROPERTY, WHAT IS NOT.—The discharge of city sewage into a stream, which, in flood-time, carries the sewer filth out upon the pasture of a lower riparian proprietor, whereby the grass is rendered worthless, and noxious

odors are emitted, to the annoyance and harm of such proprietor and his family, is not such a taking of private property as must be preceded by just compensation. (*Valparaiso v. Hagan*, 305.)

ESTATES.

1. **ESTATES.—A LEGAL ESTATE IN EXPECTANCY** is a present vested right contingent only as to possible future enjoyment. (*Lockard v. Stephenson*, 63.)

2. **ESTATE—WHAT IS NOT.—A MERE EXPECTATION** that a wife will make a will in her husband's favor, or will neither give nor grant the estate in her lifetime, and thereby a portion of all will descend to him, is without substance as a present right and incapable of estimate as to future value. (*Lockard v. Stephenson*, 63.)

ESTOPPEL.

1. **ESTOPPEL IN PAIS** requires, as to the person against whom it is claimed, opportunity to speak, duty to speak, failure to speak, and reliance in good faith upon such failure. (*Prieve v. Wisconsin etc. Co.*, 904.)

2. **ESTOPPEL AS TO LAND.—FAILURE OF RIPARIAN PROPRIETORS** to begin action to restrain a corporation from draining a navigable lake under a statute ostensibly enacted to promote the public health, but in fact to further private interests, until a large sum of money has been expended by the corporation, does not preclude them from obtaining relief by injunction, if their action is commenced seasonably after actual damage to their property, and if before any considerable expense had been incurred there had been a decision by the supreme court of the state that submerged lands of navigable lakes could not, by statute, in the furtherance of private interests be made the subject of private ownership. (*Prieve v. Wisconsin etc. Co.*, 904.)

See Negotiable Instruments, 2-9.

EVIDENCE.

1. **EVIDENCE TENDING TO PROVE AN UNDISPUTED FACT** cannot be prejudicial, however incompetent. (*Standard etc. Ins. Co. v. Schmaltz*, 112.)

2. **EVIDENCE—OBJECTION TO—WAIVER.**—If objection to the introduction of incompetent evidence has been once properly taken and overruled by the court, it is not waived, although the same evidence may have been subsequently admitted, through other witnesses, without objection. (*Mercer v. State*, 135.)

3. **HUSBAND AND WIFE—LETTERS BETWEEN—PRIVILEGED COMMUNICATIONS.**—Letters from a husband to his wife, or from her to him, are inherently and absolutely privileged communications and not admissible in evidence for or against the husband or wife, no matter in whose hands they may be. (*Mercer v. State*, 135.)

4. **HUSBAND AND WIFE—PRIVILEGED COMMUNICATIONS.**—Confidential communications between husband and wife are privileged, and the law forbids that they be detailed or divulged by either of the parties to the marriage. (*Mercer v. State*, 135.)

5. **EVIDENCE—COMPETENCY.—TESTIMONY** as to the price of goods in a certain market on a specified day by a person who testifies that he knew the fact, is competent to go to the jury in the absence of evidence that he did not know such fact. (*Carland v. Western Union Tel. Co.*, 394.)

6. EVIDENCE—PRESUMPTION AS TO EXISTENCE OF STATUTE IN ANOTHER STATE.—In a controversy here over a contract made in another state, it will not be presumed that such other state has any statute upon the subject, though there is one here. (*Meuer v. Chicago etc. Ry. Co.*, 774.)

7. EVIDENCE—PRESUMPTION—STATUTE LAW OF ANOTHER STATE.—A court will not presume that the statute law of another state is the same as the statute law of this state. (*Meuer v. Chicago etc. Ry. Co.*, 774.)

8. EVIDENCE—LAWS OF ANOTHER STATE—OBITER DICTA.—Although much of the opinion of the highest court of another state is obiter dicta, the case is still some evidence of the law of that state, and warrants a jury in finding the law of that state to be as stated in the opinion. (*Meuer v. Chicago etc. Ry. Co.*, 774.)

9. EVIDENCE—PRESUMPTION THAT A DECISION OF ANOTHER STATE COURT CONTAINS THE LAW.—A decision of the highest court of another state, as to the law of that state upon a question involved in a contract made therein, will be presumed to contain the law in force in that state at the time the contract was executed, where the decision was rendered only one year prior to the execution of the contract. (*Meuer v. Chicago etc. Ry. Co.*, 774.)

See Appeal, 2; Banks and Banking, 7; Conspiracies, 1; Indictments; Instructions, 2; Insurance, 5, 6; Judgments, 5; Larceny, 3-5; Libel, 5; Trial, 8.

EXECUTIONS.

1. EXECUTION.—CORPORATE STOCK pledged as collateral security and transferred on the books of the corporation to the pledgee cannot be sold on execution against the pledgor. (*Feige v. Burt*, 390.)

2. CORPORATIONS—STOCK—SALE UNDER EXECUTION.—The right to subject corporate stock to sale under execution being purely statutory, the provisions of the statute must be substantially observed. (*Feige v. Burt*, 390.)

3. EXECUTION—STATUTORY DOWER AND CURTESY.—The Inchoate contingent statutory interest of a husband or wife in the real estate of his or her spouse is not divested or affected by a sale of the property on execution against such spouse. (*Johnson v. Minnesota Loan etc. Co.*, 438.)

4. EXECUTION—STATUTORY CURTESY.—Though the real estate of a wife is sold on execution under a judgment against her, one-third of it descends, upon her death, to her husband, subject, in its just proportion with the other real estate, to the payment of such debts of the deceased as are not paid from the personal estate. (*Johnson v. Minnesota Loan etc. Co.*, 438.)

5. AN EXECUTION IS NOT ISSUED until delivered to an officer for service. (*McDonald v. Fuller*, 815.)

6. EXECUTION—APPARENT ALTERATION—PRESUMPTION.—It will be presumed that an apparent alteration in an execution was innocently made prior to the issuing of the writ. (*McDonald v. Fuller*, 815.)

7. EXECUTION TO ANOTHER COUNTY—DOCKETING OF JUDGMENT—VALIDITY OF EXECUTION.—Under a statute which provides that execution may be issued to the sheriff of the county where the judgment is docketed, an execution issued to a

county other than that in which the judgment was rendered is valid, though taken from the clerk's office before the judgment is docketed in the county to which it runs, if it is not delivered to the sheriff for service until after the judgment has been docketed in the latter county. (*McDonald v. Fuller*, 815.)

8. EXECUTION TO ANOTHER COUNTY—AMENDABLE IRREGULARITY.—The failure to insert, in an execution issued to another county than the one in which the judgment was rendered, the date when the judgment was docketed in the county to which the execution runs is a mere irregularity, and is amendable. (*McDonald v. Fuller*, 815.)

9. EXECUTION TO ANOTHER COUNTY PRIOR TO DOCKETING—JUSTIFICATION OF SEIZURE BY SHERIFF—REPLEVIN.—When property is seized by a sheriff upon an execution issued to a county other than that in which the judgment was rendered, that officer cannot, in an action of replevin by the owner, justify his seizure by virtue of the execution, where the writ was delivered to him before the judgment was docketed in the county to which the execution runs. (*Carson v. Fuller*, 823.)

10. EXECUTION TO ANOTHER COUNTY PRIOR TO DOCKETING OF JUDGMENT.—To uphold the validity of an execution issued to a county other than that in which the judgment was rendered, it must affirmatively appear that the judgment was docketed in the county to which the execution runs prior to the delivery of the writ to the sheriff. (*Carson v. Fuller*, 823.)

11. SCIRE FACIAS.—A levy under an execution on a judgment more than five years old, without an issue of a scire facias thereon, is irregular merely, and not void. Such irregularity cannot be taken advantage of by another judgment creditor, but only by the judgment debtor. (*Sherrard v. Johnston*, 680.)

12. EXECUTION—LIENS.—If neither of two judgments is a lien on after-acquired land, the first levy of an execution creates the first lien on the fund arising from the sale of such land. Although such levy is made under the junior judgment, it still has priority, if the debtor makes no objection, notwithstanding the fact that such judgment is more than five years old and has not been revived by scire facias. (*Sherrard v. Johnston*, 680.)

13. EXECUTION ON PERSONAL PROPERTY—FIXTURES.—Under a writ for the seizure of personal property, real property cannot be seized, and, to justify the seizure of a fixture under such a writ, facts must be averred to show that the circumstances of the attachment to the land were such that, in law, its character as personal property as not changed. (*West v. Hayes*, 24.)

14. EXECUTION IN DETINUE—PROTECTION OF OFFICER.—A court has no jurisdiction to issue a writ ordering the seizure of property while in the rightful possession of one not a party to the suit, between whom and the defendant therein there is no privity, and whose possession began previously to the commencement of the suit and continued during its pendency, and a sheriff being charged with knowledge of such want of jurisdiction, is not protected by such process. (*West v. Hayes*, 24.)

15. SHERIFF'S DEEDS—MISNOMER—EVIDENCE OF IDENTITY OF DEBTOR.—The fact that a sheriff's deed purports to convey the land of "Bertha A. Reynolds, and recites that the execution ran against Bertha Reynolds, does not render the deed inoperative ipso facto. The difference in name is not fatal to the deed, and it is competent to show the identity of the person by evidence *alIunde*. (*Hill v. Reynolds*, 329.)

16. SHERIFF'S DEEDS—SEPARATE SALES UPON SEPARATE EXECUTIONS.—If a sheriff has made, at the same time, two sales upon two executions in favor of the same creditor, and against the same debtor, the sales being to the same purchaser, he may complete the proceedings by executing and delivering one deed for both sales, and such deed is valid. (*Hill v. Reynolds*, 329.)

17. SHERIFF'S DEEDS—PRESUMPTIONS.—In support of a sheriff's deed, it must be presumed that all prior proceedings touching the sale, up to the execution of the deed, were regular and sufficient according to statutory requirements and were properly proved by competent evidence. (*Hill v. Reynolds*, 329.)

18. SHERIFF'S DEEDS—SEPARATE SALES UPON SEPARATE EXECUTIONS—PRESUMPTION.—A sheriff's deed is not void because two sales upon two executions in favor of one creditor are embraced in one deed. If the proceedings upon the two executions appear to have been simultaneous throughout, and no objection was made to the sufficiency or regularity of the proceedings prior to the execution of the deed, it must be presumed that they were regular, and that it so appeared by the returns upon the executions; that the proceedings, though simultaneous, were separate; that there were separate seizures, separate notices, and separate sales for separate prices, upon the two executions. (*Hill v. Reynolds*, 329.)

19. SHERIFF'S DEEDS—VALIDITY.—A sheriff's deed is not void merely because it does not disclose the date of the execution upon which the land was sold, the amount of the judgment debt and costs in such execution, and the name of the court from which the execution issued. These facts may be supplied by the return on the execution. (*Hill v. Reynolds*, 329.)

See *Mandamus*, 1.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—WHO MAY ACT. At common law, all persons except idiots and lunatics were competent to act as executors; neither infancy, nonresidence, coverture, intemperance, improvidence, ignorance, vice, dishonesty, nor any degree of moral guilt or delinquency, disqualified one for the office. (*Kidd v. Bates*, 17.)

2. EXECUTORS AND ADMINISTRATORS—WHO MAY ACT. UNDER A STATUTE which provides that a probate court may appoint as executors persons named in a will if they are fit persons, and which also enumerates the causes which will render persons incompetent to act, a probate court has no authority to refuse to issue letters of administration to a person because his interests are hostile to those of the estate and the legatees under the will, where such a cause is not one of the disqualifications enumerated in the statute. (*Kidd v. Bates*, 17.)

3. EXECUTORS AND ADMINISTRATORS—COMPETENCY—STATUTORY CONSTRUCTION.—A statute, one section of which empowers a court to appoint as executors persons named in a will if they are fit persons, and a subsequent section of which enumerates the persons who are not deemed fit, vests in the court a discretion to determine the existence of the particular causes of disability enumerated, but does not vest a broad discretion to determine what are causes of disability. (*Kidd v. Bates*, 17.)

4. EXECUTORS AND ADMINISTRATORS—LIABILITY OF SURETIES.—If a joint and several administrator's bond is signed by the administrator in the body thereof before delivery, the deliv-

ery without his signature at the end is not a violation of an agreement with the sureties that the bond is not to be filed until the administrator has signed it. (*Kenck v. Parchen*, 625.)

5. EXECUTORS AND ADMINISTRATORS—LIABILITY OF SURETIES.—The sureties on a joint and several administrator's bond are liable thereon, although it was signed by them on condition that it should be signed by the administrator before delivery, and such condition was not complied with. (*Kenck v. Parchen*, 625.)

6. JUDGMENTS AGAINST ADMINISTRATORS—CONCLUSIVENESS AGAINST SURETIES.—A judgment against an administrator in a probate proceeding determining the amount of his indebtedness to the estate is conclusive as against the sureties on his bond, and cannot be inquired into collaterally. (*Kenck v. Parchen*, 625.)

See Insurance, 16; Witnesses, 14.

EXEMPTION.

See Agency; Attachment, 3; Homesteads, 2; Process, 1.

EXPECTANCIES.

See Estates, 1-2.

EXPLOSIVES.

See Corporations, 9; Nuisance, 2.

FALSE PRETENSES.

FALSE PRETENSES — INDICTMENT — SUFFICIENCY.—An indictment for the offense of obtaining money under false pretenses need not allege the false pretense charged to be such as would impose upon a man of ordinary caution, or such as could not be guarded against by ordinary care and prudence. (*Lefler v. State*, 300.)

FIXTURES.

See Executions, 13.

FORECLOSURE PROCEEDINGS.

See Insurance, 19, 20; Liens, 5, 6.

FORFEITURES.

See Contracts, 6; Corporations, 1; Insurance, 18-21.

FORGERY.

1. **FORGERY—WHAT IS.**—A writing, to be the subject of forgery, must, either upon its face or by reason of attendant circumstances, have, upon the assumption of its genuineness, a capacity to injure or defraud; and a writing in the words, "Mr. Holmes, Selma, Ala. Dear Sir: The value of this chain is \$10.00 (Ten)," is not a forgery, in the absence of extrinsic facts which, taken in connection with the paper, impart to it a capacity to injure or defraud. (*Burden v. State*, 37.)

2. **FORGERY—ORDER FOR PROPERTY.**—The forging of an instrument requesting a dealer to let the party signing have certain property for which the latter agrees to settle, is the forgery of "an order," within the meaning of a statute defining as forgery the false

making or forging of "any order for money or other property." (*People v. Phillips*, 436.)

FRAUD.

See Conspiracies, 2; Judgments, 12, 14.

FRAUDULENT CONVEYANCES.

1. **FRAUDULENT CONVEYANCES—BORROWING MONEY—PLEDGE TO SECURE.**—A debtor may borrow money wherewith to discharge his bona fide indebtedness, and may pledge corporate stock to secure the party loaning the money. (*Kingman v. Mowry*, 169.)

2. **FRAUDULENT CONVEYANCES—CHANGE OF PROPERTY INTO STOCK INTEREST.**—A mere change by a debtor of his property into a stock interest in a corporation is not fraudulent in legal contemplation merely because it compels a creditor to levy upon and sell the stock interests of the debtor instead of the property which he has conveyed. (*Kingman v. Mowry*, 169.)

3. **FRAUDULENT CONVEYANCES—ORGANIZING CORPORATION AND TRANSFERRING PROPERTY TO IT.**—The formation of a corporation by a debtor, and the conveyance of all his property thereto, is not fraudulent in fact or as a matter of law, if made in good faith after notice to all his creditors and with the consent and approval of most of them, and where the debtor retains the ownership of the stock which is equally open to seizure and sale on execution as was the transferred property. (*Kingman v. Mowry*, 169.)

4. **FRAUDULENT CONVEYANCES—NECESSITY OF INTENT.**—Where the legal effect of a conveyance is to work a fraud on the rights of creditors, it will be deemed fraudulent as an inference of law, without regard to the motives which prompted it. (*Kingman v. Mowry*, 169.)

5. **HUSBAND AND WIFE—FRAUDULENT CONVEYANCES.** A deed of land from a husband to his wife, fraudulent as to his creditors at the time when it is made, cannot be sustained by relation back to an antenuptial agreement resting in parol. Marriage is not such part performance as will, in equity, take the case out of the statute of frauds. (*Barnes v. Black*, 694.)

6. **HUSBAND AND WIFE—FRAUDULENT TRANSFERS—EVIDENCE.**—If a wife claims land, as against her husband's creditors, under a deed from him based upon an antenuptial parol agreement, his acts and declarations prior to such agreement are admissible in favor of his creditors. (*Barnes v. Black*, 694.)

GAMING.

1. **GAMING—BETTING ON HORSERACES—BOOKMAKING AND POOLSELLING.**—Betting on a horserace is gambling, and bookmaking and poolselling are each betting upon a horserace or particular event upon which they are made or sold. (*St. Louis Fair Assn. v. Carmody*, 571.)

2. **GAMING—BETTING ON HORSERACES—GAMBLING HOUSE, WHAT IS.**—The keeping of a gaming-house, furnished with means and facilities for gambling, to which the public is tempted, invited, or permitted habitually to attend for the purpose of gambling, whether by betting on a horserace in sight, or at a distance, is the keeping of a common gambling-house. (*St. Louis Fair Assn. v. Carmody*, 571.)

3. HORSERACING AND FURNISHING REFRESHMENTS AS A LAWFUL BUSINESS.—It is not unlawful to keep a racetrack, and to induce horseraces thereon by giving prizes to the winners; nor is it unlawful, under license, to provide stands to dispense refreshments to persons attending the races, making it more attractive to patrons of the racetrack, provided there is no ulterior consideration, of an unlawful character, entering into the transaction. (*St. Louis Fair Assn. v. Carmody*, 571.)

See Contracts, 8, 11, 12; Pleading, 9.

GARNISHMENT.

See Attachment, 3.

GIFTS.

1. GIFTS—DELIVERY OF INSTRUMENT.—While a delivery may be by words, acts, or both combined, it is indispensable, whatever means may be adopted, that the deed pass beyond the dominion and control of the donor; otherwise, it cannot be said to come within the power and control of the donee. (*Weaver v. Weaver*, 173.)

2. GIFTS—INSURANCE POLICY—DELIVERY.—The execution of an assignment of an insurance policy to one's mother, and a promise to keep such assignment and policy for her, is not such a parting with the control of the policy and the assignment as will constitute a valid delivery or deprive the son of the power to make a subsequent assignment to his wife. (*Weaver v. Weaver*, 173.)

3. GIFTS—INSURANCE POLICY—DELIVERY TO THIRD PERSON.—The delivery of a copy of an assignment of an insurance policy to an agent of the company, in compliance with a condition in the policy, does not constitute a delivery to the company for the benefit of the assignee. (*Weaver v. Weaver*, 173.)

4. TO CONSTITUTE A VALID GIFT CAUSA MORTIS, there must be a delivery to the donee at the time of the donation. It is not enough that the donee had a previous and continuous possession of the gift. Hence, where the donee is a student in the donor's office, having a key to the same, a mere statement by the donor to the donee at the donor's residence that he gave the donee all the office furniture does not constitute a sufficient delivery to consummate a gift. (*Allen v. Allen*, 442.)

5. GIFTS CAUSA MORTIS.—To constitute a valid gift causa mortis, the gift must be with a view to the donor's death, to take effect only on such death by his existing illness, and there must be an actual delivery of the subject of the donation. (*Allen v. Allen*, 442.)

See Husband and Wife, 6; Trusts, 3; Wills, 6.

HIGHWAYS.

1. HIGHWAYS.—LEGISLATION IN REGARD TO HIGHWAYS is an exercise of the police power and need not be uniform throughout the state, but may be adapted to the wants of the various localities. (*State v. Sharp*, 663.)

2. HIGHWAYS—STATUTES REQUIRING PERSONS TO WORK ON ROADS—CONSTITUTIONALITY.—A statute requiring persons to work on public roads a certain time without compensation is not a tax, within the meaning of constitutional requirements of prescribed equation between poll and property tax. Such requirement is simply a duty imposed, similar to jury service, and a failure or neglect to perform such duty when requested may be made an indictable offense. (*State v. Sharp*, 663.)

3. **HIGHWAYS—NOTICE TO WORK ON.**—A road overseer may testify that he left a written notice at the defendant's residence, specifying time and place for working on a public highway, without producing such notice, when the statute requires the notice, and not a copy of it, to be left with the defendant. (*State v. Sharp*, 663.)

HOMESTEADS.

1. **HOMESTEADS — PURCHASE MONEY — BORROWED MONEY.**—Money borrowed of a third person with which to purchase a homestead, when it is understood between the lender and borrower that it is to be used for that purpose, and it is so used, is purchase money, and the homestead is liable therefor. (*Acrumen v. Barnes*, 104.)

2. **HOMESTEADS—EXEMPTION OF INSURANCE MONEY.**—If money is loaned with which to purchase a homestead and so used, and a mortgage given to the lender to secure its repayment, insurance money due on a building constituting part of the homestead is not exempt, in favor of the borrower, from seizure on process of garnishment or execution for the mortgage debt due the lender. (*Acrumen v. Barnes*, 104.)

3. **HOMESTEADS.—LEASE OF** a homestead does not necessarily constitute an abandonment thereof. (*White Sewing Machine Co. v. Wooster*, 100.)

4. **HOMESTEADS—CONVEYANCE TO CHILDREN—RIGHTS OF CREDITORS.**—A surviving husband, having a homestead in an estate by the curtesy, may convey such estate to his children without interference by his creditors. (*White Sewing Machine Co. v. Wooster*, 100.)

5. **HOMESTEADS IN ESTATES BY CURTESY.**—The possessory interest of a tenant by the curtesy consummate is sufficient to support a claim of homestead. (*White Sewing Machine Co. v. Wooster*, 100.)

6. **HOMESTEADS—SALE—CLOUD ON TITLE.**—A sale of a homestead, under execution by the creditors of the homesteader creates a cloud upon the title, which may be removed in equity. (*White Sewing Machine Co. v. Wooster*, 100.)

7. **HOMESTEADS—WHEN NOT LOST.**—If the association of persons constituting the family is broken up, whether by separation or death of some of the members thereof, or coming of age of the children, the right of the homestead continues in the former head of the family, provided he still resides at his old home, and continues to occupy it as his homestead. (*White Sewing Machine Co. v. Wooster*, 100.)

HOMICIDE.

1. **MANSLAUGHTER—COOLING TIME—OPINION OF JUDGE.** AN INSTRUCTION relating to killing under sudden heat and passion without time to cool, which uses the words "because some people don't cool, and some don't want to cool," does not convey to the jury the impressions of the judge upon the testimony, where the charge is general and does not mention, directly or indirectly, any part of the testimony. (*State v. Sumner*, 707.)

2. **HOMICIDE — MANSLAUGHTER—PROVOCATION.**—Where one provokes a fight for the sole purpose of killing the one provoked under circumstances which might appear to be sudden and unexpected, and then kills, it is murder, and not manslaughter. (*State v. Sumner*, 707.)

3. HOMICIDE—SELF-DEFENSE.—If there is any reasonable, safe way to escape, a person ought to do it, and not take the life of his fellow-man. (*State v. Sumner*, 707.)

HORSERACING.

See Gaming, 1-3.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—TENANTS BY ENTIRETY—RIGHT OF EITHER TO CONVEY.—A husband or wife, as tenants of land by entirety, cannot convey his or her interest so as to affect the right of survivorship in the other. (*Roulston v. Hall*, 97.)

2. HUSBAND AND WIFE—ESTATES BY ENTIRETY.—If land is conveyed to a husband and wife, they take an estate by entirety, not subject to dower. (*Roulston v. Hall*, 97.)

3. HUSBAND AND WIFE—RETROACTIVE EFFECT OF STATUTES RESPECTING.—Under the married woman's act of Missouri, passed in 1875, a husband, though married to his wife before the passage of that act, has no vested interest in personal property acquired by her subsequently to that date, and has no power to appropriate it to his own use without her consent in writing. Hence, if he appropriates advancements made to his wife by her father, without such consent, she may treat him as a trustee, or as a debtor, and recover the amount from his administrator after his death. (*Winn v. Riley*, 517.)

4. HUSBAND AND WIFE—DEED—CONSIDERATION—EVIDENCE.—If a wife claims land under a deed from her husband as against his creditors, she is entitled to prove that the real consideration for the deed was an antenuptial parol agreement, and not the money consideration, nor love and affection enumerated in the deed, but the exclusion of such evidence is not ground for reversal of the judgment, if its admission would have availed nothing. (*Barnes v. Black*, 694.)

5. HUSBAND AND WIFE—INSOLVENCY OF HUSBAND—RIGHT OF WIFE TO PROVE CLAIM.—A wife to whom her husband is indebted may prove and enforce her claim against his estate in insolvency. (*Weeks and Potter Co. v. Elliott*, 348.)

6. HUSBAND AND WIFE—GIFT TO WIFE—CREDITOR'S FRAUD.—A postnuptial settlement on a wife by a husband not indebted at that time is good against his subsequent creditors, if not made with fraudulent intent as to them, and though such settlement may as to existing creditors be fraudulent, it does not even raise a presumption of fraud against creditors whose debts had no existence at the time it was made. (*Best v. Smith*, 676.)

See Evidence, 3, 4; Fraudulent Conveyances, 5, 6; Witnesses, 5-7.

IMPROVEMENTS.

See Municipal Corporations, 1; Partition, 2, 3.

INDICTMENT.

1. INDICTMENTS—EVIDENCE TO QUASH.—Courts, for the purpose of quashing indictments formally returned by a regular grand jury, never inquire into the character of the evidence that influenced the grand jury in finding such indictment. (*Mercer v. State*, 135.)

2. PLEADING—INDICTMENT.—IN ALLEGING a statutory offense only such exceptions and provisos need be negated as are descriptive of the offense. (*State v. Bouknight*, 751.)

See Appeal, 5; Burglary; False Pretenses; Trespass, 3.

INJUNCTIONS.

1. INJUNCTIVE RELIEF IS DENIED IN CASES OF DAMNUM ABSQUE INJURIA. Hence, as a city has a right to discharge its sewage into a natural watercourse extending through it, where there is no other natural or reasonably possible method of discharging the sewage, a court of equity will not enjoin such discharge, though the waters of the stream are polluted to the injury of lower riparian proprietors, where the city acts in conformity with the law governing it, and without negligence. (*Valparaiso v. Hagen*, 305.)

2. BOYCOTTS—CIRCULARS—INJUNCTION.—The distribution of boycott circulars containing false statements and with an avowed intention of thus ruining the complainant's business, though carried on without violence, is an act or coercion which may be enjoined. (*Beck v. Railway etc. Union*, 421.)

3. BOYCOTTS.—INJUNCTIONS MAY BE GRANTED to restrain labor unions or combinations of persons from attempting to injure or ruin the complainant's business, by intimidating and coercing his employes and customers. (*Beck v. Railway etc. Union*, 421.)

See Boycotts, 3; Corporations, 18, 22; Municipal Corporations, 3, 9; Partition, 2, 3; Railroads, 2, 3; Waters and Watercourses, 4.

INNKEEPERS.

1. INNKEEPERS—LIEN OF UPON PROPERTY OF THIRD PERSONS.—A statute which provides that an innkeeper shall have a lien upon, and the right to detain, personal property placed by his guests under his care, and that baggage and other property "belonging" to any person who shall abscond without paying his bill, may be disposed of by the innkeeper to realize the amount due him, does not give him any lien on property leased by his guest of a third person, and left in the guest's room after his departure. (*McClain v. Williams*, 791.)

2. INNKEEPERS—LIEN UPON THIRD PERSON'S PROPERTY—DUE PROCESS OF LAW.—Under the provisions of the code and constitution of South Dakota an innkeeper cannot have a lien, for the board of a guest, on a third person's property, loaned or leased to the guest, because to allow such a lien would be depriving one of his property without due process of law. (*McClain v. Williams*, 791.)

INSOLVENCY.

INSOLVENCY—EFFECT ON ATTACHMENT LIENS.—If land under attachment has passed to the attachment defendant's assignee in bankruptcy, and has been sold by the latter, subject to the attachment, and the attachment defendant has subsequently died, and his estate has been duly adjudged and decreed insolvent, the attachment is thereby dissolved, and the attachment plaintiff is not entitled to a special judgment against the property attached. (*Belfast Sav. Bank v. Lancey*, 361.)

See Corporations, 13-17; Husband and Wife, 5; Setoff, 1.

INSTRUCTIONS.

1. INSTRUCTION, THOUGH ERRONEOUS, DOES NOT JUSTIFY A REVERSAL, WHEN.—An erroneous instruction does not justify a reversal of judgment for the plaintiff, where it is followed by such plain and explicit directions regarding the facts necessary to a recovery by the plaintiff that it is impossible to believe that the verdict was influenced thereby. (*Johnson v. Glidden*, 795.)

2. INSTRUCTIONS—EVIDENCE.—An instruction to which no evidence adduced in the case can apply should not be given. (*Progress etc. Co. v. Gratiot etc. Co.*, 557.)

3. INSTRUCTIONS—DEFINITENESS.—A PARTY CANNOT ON APPEAL, COMPLAIN that the instructions given were not sufficiently definite, where he failed to request any instructions and did not preserve any exceptions to those given. (*Dell Rapids etc. Co. v. Dell Rapids*, 783.)

4. CRIMINAL LAW.—AN INSTRUCTION THAT "A REASONABLE DOUBT is a strong doubt based on the testimony," is correct. (*State v. Sumner*, 707.)

5. APPEAL—INSTRUCTIONS.—IT IS NOT PREJUDICIAL ERROR for a judge, in an instruction, to refer to issues based upon the arguments and the indictment, where he disowns any reference to the testimony. (*State v. Sumner*, 707.)

6. CRIMINAL LAW—INSTRUCTIONS—WHEN MADE.—A judge may charge a jury before the introduction of any evidence, and it is a part of his general charge, but he takes the chances that it will be applicable to the state of facts developed by the testimony. (*State v. McGee*, 741.)

See Damages, 3; Homicide, 1; Negligence, 1; Trial, 2.

INSURANCE.

1. INSURANCE—ACCIDENT—INTENTIONAL INJURY.—A person insured under an accident insurance policy containing a provision that the insurance shall not cover "intentional injuries inflicted by the insured, or by any other person, except burglars and robbers," cannot recover when he is violently assaulted by another person, not a burglar or robber, who intentionally strikes him, causing the injury under which he claims to recover. (*Matson v. Travelers' Ins. Co.*, 368.)

2. INSURANCE—ACCIDENT—DEATH BY ACCIDENTAL MEANS.—The rupture of a blood vessel in the stomach, caused by a sudden wrench of the body sustained in removing a heavy cylinder-head from an engine, and causing the death of the insured, who was a strong and healthy man, engaged as a machinist at the time the policy was issued and also at the time of the accident, is such a death as will sustain an action to recover under a policy of insurance against death resulting from injuries sustained solely by external, violent, and accidental means. (*Standard etc. Ins. Co. v. Schmaltz*, 112.)

3. INSURANCE—ACCIDENT—PROOF OF DEATH—WAIVER. If, after the death of the insured, the beneficiary notifies the insurer of the death of the insured, and requests it to send her the customary blanks for proof of death, and the insurer sends her a blank notice of death to be filled in, informing her that it would later send her others, and by its statements and conduct induces her to rely on it to send appropriate blanks until the time for making proof of death has expired, it cannot take advantage of its failure to do so, and must be deemed to have waived the proof of death. (*Standard etc. Ins. Co. v. Schmaltz*, 112.)

4. **INSURANCE—ACCIDENT—INJURY FROM LIFTING.**—If a person insured under an accident policy, providing that it shall not cover injuries from "lifting," ruptures a blood vessel of the stomach, causing death, by lifting a heavy cylinder-head in the course of his employment, a recovery may be had under the policy, if the application for insurance notified the insurer of the nature of the occupation of the insured. (Standard etc. Ins. Co. v. Schmaltz, 112.)

5. **INSURANCE—ACCIDENT—EVIDENCE.**—In an action on an accident insurance policy, where death is alleged to have been caused by the rupture of a blood vessel, resulting from lifting a heavy cylinder-head, it is proper to permit a physician, who has testified on cross-examination "that it was not necessary that there should be an unusual jerk or slip to rupture a blood vessel in the stomach, but that it might be ruptured by over-exertion, or by excessive lifting in the usual way," to testify, on redirect examination, "that such a rupture would more likely be caused by a jerk or wrench of the body." (Standard etc. Ins. Co. v. Schmaltz, 112.)

6. **INSURANCE—ACCIDENT—EVIDENCE.**—In an action on an accident insurance policy, the admission of the testimony of the decedent's physician, detailing a declaration by the decedent made to him as to the cause of injury, and how it happened, is harmless error, if such evidence merely corroborates facts alleged in the complaint and undisputed by the answer or evidence. (Standard etc. Ins. Co. v. Schmaltz, 112.)

7. **INSURANCE—WHAT IS NOT WAIVER OF ARBITRATION.**—Neither the failure to admit liability nor the demand for arbitration is equivalent to denial of liability which amounts to a waiver of arbitration, for the reason that in case of such denial the dispute is not about the amount of loss. (Western Assur. Co. v. Hall, 48.)

8. **INSURANCE—REFUSAL TO ARBITRATE—WHAT NOT SUFFICIENT EXCUSE FOR.**—A refusal to allow arbitrators to proceed, merely alleging that the umpire and the appraiser appointed by the insurer are interested parties and employed by the insurer, without any proof of interest, partiality, or other incompetence, is not a sufficient excuse for a failure to arbitrate as required by the policy. (Western Assur. Co. v. Hall, 48.)

9. **INSURANCE—ARBITRATION—WHO MAY BE ARBITRATORS.**—Where, in case of disagreement as to loss, an insurance policy provides that the loss may be appraised by arbitrators, the parties are not bound to submit to an appraisement by interested or otherwise incompetent parties. (Western Assur. Co. v. Hall, 48.)

10. **INSURANCE—EVIDENCE OF LOSS WHERE NO AWARD BY ARBITRATORS.**—In an action on a fire insurance policy, evidence as to loss is properly admitted, where there has been no award by arbitrators in accordance with the terms of the policy. (Western Assur. Co. v. Hall, 48.)

11. **INSURANCE—FAILURE TO ARBITRATE—EFFECT OF.**—If the failure to arbitrate is due to the fault of the insured, it is a defense to an action on the policy, but, if due to the fault of the insurer, the lack of an award is not available to defeat a recovery. (Western Assur. Co. v. Hall, 48.)

12. **INSURANCE—WHEN NOT REQUIRED TO ARBITRATE.**—After disagreement as to loss and a request by either party for arbitration, both parties are under a duty to act in good faith to have the loss ascertained as provided by the policy; and if either in bad faith prevents such ascertainment by refusing to proceed, or by insisting on the selection of improper arbitrators, or by undue

interference with them after their selection, the other party is thereby absolved from further obligation to arbitrate. (Western Assur. Co. v. Hall, 48.)

13. **INSURANCE—ARBITRATION—RIGHT TO SUE.**—While a provision for arbitration in an insurance policy is binding, it is collateral to the contract for insurance, and if it fails of accomplishment without fault of the parties, they are relegated to their legal rights independent thereof. (Western Assur. Co. v. Hall, 48.)

14. **INSURANCE — CONSTRUCTION OF STIPULATION.**—Where an insurance policy contains a provision that the policy shall be void "if, with the knowledge of the insured, foreclosure proceedings be commenced," the knowledge of such proceedings need not antedate or coexist with their commencement, but is required only when the papers are served, and the forfeiture takes effect at that time. (Norris v. Hartford Ins. Co., 765.)

15. **INSURANCE POLICY—CONSTRUCTION.**—If a clause in an insurance policy is susceptible of two interpretations, that will be adopted which is most favorable to the insured, in order to indemnify him for the loss which he has sustained. (Forest City Ins. Co. v. Hardesty, 161.)

16. **INSURANCE—FIRE—ACTION BY ADMINISTRATOR OF INSURED.**—Where, by the terms of an insurance policy, the company agrees to "make good unto the said assured, his executors, administrators, and assigns" all such loss or damage as shall happen by fire, an administrator may maintain an action on the policy to recover for a loss occurring after the death of the insured. (Forest City Ins. Co. v. Hardesty, 161.)

17. **INSURANCE—FIRE—CHANGE OF TITLE—DEATH OF INSURED.**—Under an insurance policy which contains a clause that "if any change takes place in the title" in the property the policy shall be void, the death of the insured does not work such a change of title as to make the policy void. (Forest City Ins. Co. v. Hardesty, 161.)

18. **INSURANCE—FORFEITURE—POWER OF LOCAL AGENT TO WAIVE.**—A local agent of an insurance company, who has power to make contracts of insurance in the name of the company, to issue policies, to receive premiums therefor, and who is clothed with all the authority of his principal with respect to such matters, has power to waive a condition of the policy. Hence, if a policy upon mortgaged property provides that it shall become absolutely void upon the commencement of proceedings for the foreclosure of the mortgage, without the written consent of the company, and the property is advertised for sale, under the terms of the mortgage, because of the nonpayment of taxes, there is a forfeiture of the policy, but if the local agent, being advised of the advertisement for such sale, takes no action toward a cancellation of the policy, his conduct amounts to a waiver of the forfeiture, although the policy declares that the company's secretary alone can waive conditions therein. (Springfield etc. Co. v. Trader's Ins. Co., 521.)

19. **INSURANCE—FORFEITURE BY COMMENCEMENT OF FORECLOSURE PROCEEDINGS.**—If a policy of insurance upon mortgaged property expressly provides that it shall become absolutely void upon the commencement of proceedings for the foreclosure of the mortgage, without the written consent of the insurance company, and the mortgage, by its terms, is subject to foreclosure, if the taxes on the mortgaged property are permitted to become delinquent, the policy becomes void, when the property is advertised for sale on account of such default, unless the breach is waived. (Springfield etc. Co. v. Traders' Ins. Co., 521.)

20. INSURANCE — COMMENCEMENT OF FORECLOSURE PROCEEDINGS—WHAT IS.—The advertisement of mortgaged property for sale, as provided by the mortgage, is the commencement of foreclosure proceedings, within the meaning of a policy of insurance which provides that it shall be absolutely void upon the commencement of proceedings for the foreclosure of the mortgage. (*Springfield etc. Co. v. Traders' Ins. Co.*, 521.)

21. INSURANCE—FORFEITURE FOR ADDITIONAL INSURANCE—NOTICE TO COMPANY.—Where an insurance policy is, by its terms, declared to be void, if, at the time of its issuance, there was other insurance on the property, the fact that other insurance existed on the property will not cause a forfeiture of the policy, when the insurance company had imputed notice, through its agent, of the existence of such insurance. (*McBryde v. South Carolina Ins. Co.*, 769.)

22. INSURANCE—PROOF OF LOSS—OBJECTION TO.—Where the proof of loss is not made in strict conformity with the form prescribed by the policy, the insurance company waives the right to object to the form of such proof by failing to object to the proofs and not requiring other proper evidence, and by contesting the case upon its merits. (*McBryde v. South Carolina Ins. Co.*, 769.)

23. INSURANCE—MUTUAL—WAIVER.—The doctrine of waiver as applied to ordinary insurance companies is applicable to mutual insurance companies. (*McBryde v. South Carolina Ins. Co.*, 769.)

24. INSURANCE—PLEADING DEFENSE.—In an action on an insurance policy, containing a provision that the policy shall be void if the insured has knowledge of the commencement of foreclosure proceedings against any property covered by the policy, an answer, which sets up as a defense a breach of this provision, is good on demurrer. (*Norris v. Hartford Ins. Co.*, 765.)

See Gifts, 2, 3; Homesteads, 2; Trusts, 3.

INTEREST.

See Negotiable Instruments, 12; Suretyship, 5-7.

INTOXICATING LIQUORS.

1. LIQUORS—DISPENSARY LAW—CONTRABAND.—Liquors purchased outside the state of South Carolina for personal use are not contraband simply because the packages in which they come do not have attached to them certificates as required by the dispensary law. (*State v. McGee*, 741.)

2. INTOXICATING LIQUORS — CIVIL LIABILITY OF SALOON-KEEPER.—If money is taken from a person by a third party, while the former is intoxicated and incapacitated on liquor sold him in a saloon, the saloon-keeper is not liable for the loss, under a statute requiring him to give a bond conditioned to pay all damages that may be occasioned by reason of liquor sold at his saloon. The liquor thus sold is not the proximate cause of the loss, as that is due to the intervening wrongful act of a third person. (*Gage v. Harvey*, 70.)

JUDGMENTS.

1. JUDGMENT ON ENTIRE CONTRACT AS BAR.—A person wrongfully discharged before the end of the period covered by a contract for personal services, and paid the wages due him up to the time of his discharge, cannot, after suing for and recovering damages for the breach of the contract up to the time of suit, maintain another action to recover for the balance of the period

covered by the contract. In such case, the first judgment is a bar to the second suit. (*Allie v. Nadeau*, 346.)

2. JUDGMENT ON ENTIRE CONTRACT AS BAR.—A person cannot sever an indivisible contract, and thereby become entitled to maintain several actions for several breaches of it, simply by limiting his claim for damages in his earlier actions to less than full damages. In such case it is presumed that the plaintiff alleged and recovered in his first action all the damages that he had sustained. (*Allie v. Nadeau*, 346.)

3. JUDGMENT ON ENTIRE CONTRACT, WHEN A BAR.—But one action can be maintained for the breach of an indivisible contract, and the judgment in that action is a bar to a second suit. (*Allie v. Nadeau*, 346.)

4. JUDGMENTS—LIFE OF.—As between the parties, a judgment unpaid remains in force notwithstanding the expiration of its lien. It is not presumed to be paid until after the lapse of twenty years, although after five years it is presumed that the debtor may have a valid defense against an execution, and the law requires that he shall have an opportunity to show it before his land is seized. In such case a scire facias should issue before the levy of the execution. (*Sherrard v. Johnston*, 680.)

5. JUDGMENTS — EFFECT AS EVIDENCE AGAINST STRANGER.—A decree of divorce is not admissible in evidence against a stranger to it, to show that the property in controversy is a homestead. (*Roulston v. Hall*, 97.)

6. JUDGMENT LIEN ON MORTGAGED PROPERTY—RIGHT AGAINST PURCHASER.—Where mortgaged property, which has subsequently become subject to a judgment lien, is purchased from the defendant and removed from the state, the judgment lienholder may recover from such purchaser to the extent the value of the property removed from the state was in excess of the amount due on the mortgage, although such purchaser may not have had actual notice of the judgment lien. (*Hamilton v. Phillips*, 29.)

7. JUDGMENT LIEN—RIGHT AGAINST PURCHASER REMOVING PROPERTY FROM STATE.—If the power to effectuate a judgment lien is lost through the act of a third party in purchasing the property from the defendant and removing it from the state, the judgment lienholder may recover from such purchaser to the extent that he might have satisfied his judgment out of the property if it had not been removed, notwithstanding the purchaser had no actual notice of the lien. (*Hamilton v. Phillips*, 29.)

8. JUDGMENT LIEN — PROPERTY REMOVED FROM COUNTY.—A judgment lien, though suspended as to property removed from the county, is still a potential lien, and may be effectuated as against ad interim purchasers for value without actual notice through an execution sent to the county to which the property has been removed. (*Hamilton v. Phillips*, 29.)

9. JUDGMENTS—LIEN OF—MORTGAGE FOR PURCHASE MONEY AND OTHER DEBTS.—If a judgment debtor, immediately upon acquiring land, executes a mortgage to secure the purchase money and also an antecedent debt, the judgment must be postponed to such purchase money, but is superior to such prior debt. (*Well v. Casey*, 644.)

10. JUDGMENTS — LIEN OF — MORTGAGE — PURCHASE MONEY.—A judgment debtor may purchase land and at the time that he receives his conveyance may give, to secure any portion

of the purchase price, a mortgage, which takes precedence over the judgment as a lien on the land purchased. (*Weil v. Casey*, 644.)

11. JUDGMENTS—LIEN OF—MORTGAGE FOR OTHER THAN PURCHASE MONEY.—If, upon acquiring land, the judgment debtor immediately executes a mortgage, not for the purchase money, the lien of such mortgage is subordinate to that of the judgment. (*Weil v. Casey*, 644.)

12. JUDGMENTS—RELIEF FROM FRAUD AND MISTAKE.—A judgment, free from jurisdictional defects, cannot be relieved against for fraud or mistake going to the judgment itself, after the term when it was rendered and the time prescribed by statute has expired, except by an independent action in equity. (*Zinc Carbonate Co. v. First Nat. Bank*, 845.)

13. JUDGMENTS.—RELIEF FROM THE INEQUITABLE USE of a judgment must be sought by motion in the action wherein the judgment was rendered, when the time limited by statute for opening the judgment has not expired, or the court had no jurisdiction to enter it, or the time limited by statute for opening the judgment has expired, and its inequitable use only is complained of. (*Zinc Carbonate Co. v. First Nat. Bank*, 845.)

14. JUDGMENTS—SETTING ASIDE FOR FRAUD.—A judgment fraudulent as to the debtor cannot be set aside by creditors unless there is collusion or fraud as to them. The same rule applies when the judgment is not fraudulent or void, but merely irregular. (*Sherrard v. Johnston*, 680.)

See Appeal, 7; Attorney and Client, 5; Cotenancy, 4; Executions, 7-10; Executors and Administrators, 6; Justices of Peace, 4-6.

JUDICIAL SALES.

JUDICIAL SALES—VALIDITY—COLLATERAL ATTACK—EQUITY JURISDICTION.—A statute providing that "sales of real estate may be made under the provisions of a will, without the executor giving bond when the will so provides" does not apply when the testatrix in her will requests that "no official bond be required to be filed by the executor in his said capacity," and the will makes no provision for the sale of real estate. Hence, a probate decree licensing the sale of land in such case by an executor without his giving bond is void and renders the sale invalid, subjecting both decree and sale to collateral attack, though no appeal is taken. A complainant, however, who is not in possession of the land, has a complete and adequate remedy at law, and cannot maintain a bill in equity to remove the alleged cloud upon his title arising from the executor's deed. (*Snow v. Russell*, 350.)

JURISDICTION.

1. JURISDICTION.—A PROBATE COURT has no jurisdiction over actions for the specific performance of parol contracts for the conveyance of real estate. Hence, a person is not barred to enforce such a contract in a court of general jurisdiction, even though a will has been proven in the probate court, and such court has by decree fixed the status of the estate. (*Svanburg v. Fosseen*, 490.)

2. JURISDICTION—NONRESIDENTS—SUBSTITUTED SERVICE.—State courts cannot acquire jurisdiction over nonresidents by substituted process for mere purposes of personal adjudication against them, but only to adjudicate with reference to property within the state, or with reference to the status of one of her own citizens. (*Moyer v. Koontz*, 837.)

3. JURISDICTION—SERVICE UPON NONRESIDENTS.—Substituted service of process without the state upon the children and administrator of a deceased person is not sufficient to confer jurisdiction upon a state court to set aside a decree of divorce obtained by such deceased in his lifetime. (*Moyer v. Koontz*, 837.)

See Judicial Sales; Justice of the Peace, 1, 2; Liens, 3-6.

JUSTICE OF THE PEACE.

1. JUSTICE OF PEACE—JURISDICTION—PRESUMPTION.—Every reasonable presumption should be indulged to uphold the jurisdiction and proceedings of a justice of the peace. Hence, the failure of the justice to sign his name to the judgment entered on his docket does not render the judgment void. (*Fulton v. State*, 854.)

2. JUSTICE OF PEACE—JURISDICTION.—The failure of a justice of the peace, in entering an adjournment on his docket, to state the year does not deprive him of jurisdiction, as the current year must be understood as having been intended. (*Fulton v. State*, 854.)

3. JUSTICE OF PEACE—JURISDICTION—APPEARANCE.—If a justice of the peace fails to note in his docket the place to which a case is adjourned, he loses jurisdiction, and his judgment is void; but a subsequent general appearance and adjournment by "mutual consent" revives the jurisdiction. (*Fulton v. State*, 854.)

4. JUSTICE OF PEACE—JUDGMENTS—PRESUMPTION.—It is not absolutely necessary for the docket entry of a justice of the peace to show the time when a judgment was entered; and although no date was noted on the margin or in the body of the docket as to the time when such judgment was in fact rendered, it is nevertheless valid, if sufficient appears to show that it followed in consecutive order after the hearing of proof, and upon the same day that the case was called. (*Fulton v. State*, 854.)

5. JUSTICE OF PEACE—DOCKET ENTRIES—CONCLUSIVE-NESS.—An entry in a justice's docket that "parties appeared" is, in the absence of any qualification, a general appearance; and, on the return of a justice of the peace to a writ of certiorari, is conclusive, and cannot be collaterally attacked by extrinsic evidence, or by the statements of the justice himself. (*Fulton v. State*, 854.)

6. JUSTICE OF THE PEACE—POWER TO ALTER DOCKET AFTER ENTRY OF JUDGMENT.—After a justice of the peace has entered a final judgment upon which a defeated litigant has proceeded with reference to an appeal, the justice has no power to change his docket with respect to the parties or subject matter. Hence, he cannot, of his own motion, change an entry in the docket to show that the action was dismissed on plaintiff's motion, instead of the defendant's as recited in the entry. (*McCormick etc. Co. v. Halvorson*, 820.)

7. JUSTICE OF THE PEACE—DISMISSAL OF ACTION AFTER CHANGE OF VENUE.—It is reversible error for a justice of the peace, into whose court a case has been brought by the defendant upon a change of venue, to dismiss the action, upon the defendant's *ex parte* application, seven days after such change, in the absence of any agreement of the parties as to the time of trial, and without the service or issuance of a notice by the justice stating when and where the trial would take place, as required by statute. (*McCormick etc. Co. v. Halvorson*, 820.)

LABOR AND TRADES UNIONS.

1. LABOR UNIONS—RIGHTS OF.—Laborers have the right to combine and to fix a price upon their labor and refuse to work

unless that price is obtained. They may use persuasion to induce men to join their organization, or to refuse to work except for an established wage, and they may present their cause to the public in newspapers or circulars, in a peaceable way, and with no attempt at coercion, but the law does not permit them to use force, violence, or threats thereof, or intimidation or coercion. (*Beck v. Railway etc. Union*, 421.)

2. **LABOR UNIONS AND EMPLOYERS.**—Employés have the right to combine in unions to fix their wage rate, and employers have a right to combine and fix a rate they are willing to pay; but both must act in a peaceable way, with no attempt at coercion or intimidation. (*Beck v. Railway etc. Union*, 421.)

3. **LABOR UNIONS—INTERFERENCE WITH EMPLOYERS.**—The law protects employers against the unlawful interference by trade unions, with the right of the former to employ whom they please, at such prices as they and the persons employed can agree upon, and to discharge them at the expiration of their terms of service or for violations of their contracts. (*Beck v. Railway etc. Union*, 421.)

LANDLORD AND TENANT.

1. **LEASE—ABANDONMENT OF.**—Whether a lessee has abandoned his lease, so as to entitle the lessor to re-enter, is a question of fact to be determined by the jury from the acts, declarations, and intentions of the parties. (*Aye v. Philadelphia Co.*, 696.)

2. **LANDLORD AND TENANT—ASSIGNEE OF LEASE—NOTICE.**—If a subsequent lease refers to a former one, an assignee of the subsequent takes with notice of the prior lease. (*Aye v. Philadelphia Co.*, 696.)

3. **LANDLORD AND TENANT—OIL LEASES.**—The rule in regard to contracts that where the parties have expressly agreed on what shall be done, there is no room for the implication of anything not so stipulated for, is equally applicable to oil and gas leases as to other contracts. (*Aye v. Philadelphia Co.*, 696.)

4. **LANDLORD AND TENANT—LEASE OF OIL LANDS—CONSTRUCTION.**—If the parties to a lease of oil lands provide for a test well and what shall be done in case it produces oil in paying quantities, but make no provision what shall be done in case the well proves dry, there is an implied obligation on the part of the lessee, if the test well proves dry, to proceed with the exploration and development of the land with reasonable diligence, according to the usual course of business, and a failure to do so amounts to an abandonment which will sustain a re-entry by the lessor. (*Aye v. Philadelphia Co.*, 696.)

See *Waters and Watercourses*, 2.

LARCENY.

1. **LARCENY.—AT COMMON LAW.** larceny could not be committed of a dog. (*State v. Langford*, 746.)

2. **LARCENY—DOGS.**—In a state where dogs are taxed as personal property, they are chattels within the meaning of a statute defining larceny, and are therefore the subject of larceny. (*State v. Langford*, 746.)

3. **LARCENY—POSSESSION AS EVIDENCE OF GUILT—EXPLANATION.**—The presumption of guilt in larceny that the law permits to be drawn as a matter of fact from the unexplained possession of property recently stolen grows out of, and rests solely upon, the unexplained possession thereof, and not upon any altera-

tions or mutations to which the property may have been subjected while in the defendant's possession, or before it reached his possession, and it is error to impose upon him the duty of doing more than to reasonably and credibly explain his possession of property alleged to have been stolen, in order to remove the presumption of guilt that may arise from such possession. (*Williams v. State*, 154.)

4. **LARCENY—POSSESSION OF STOLEN GOODS AS EVIDENCE OF THEFT.**—An instruction in a larceny case "that when a man is found in possession of stolen cattle, with the mark or brand changed into his, or with his mark or brand on the cattle, in the absence of a reasonable and credible explanation of these facts" an inference of guilt may be drawn, is erroneous: 1. Because it omits the legal requirement that the possession of stolen goods must be "recent" after the theft, before it can be relied upon as a basis for the presumption of guilt; and 2. Because it requires a reasonable and credible explanation from the possessor, not only of his possession of the goods, but also of an alteration of the distinguishing marks and brands on such property, before such explanation is permitted to acquit him of charge of its larceny. (*Williams v. State*, 154.)

5. **LARCENY—POSSESSION AS EVIDENCE OF THEFT.**—Possession of stolen property must be recent after the theft in order to impute guilt to the possessor. The presumption is stronger or weaker in proportion to the period intervening between the taking and finding, and it may be entirely removed by the lapse of such time as to render it not improbable that the goods may have been taken by another and passed to the accused. (*Williams v. State*, 154.)

6. **LARCENY—EMBEZZLEMENT—"ACCESS TO CONTROL, OR POSSESSION OF PROPERTY."**—A farmhand, who breaks open a box of wheat belonging to his employer, during the latter's absence and without his knowledge or consent, and removes and sells the wheat, it not being specially intrusted to him for any purpose, is guilty of larceny and not of embezzlement. Such felonious appropriation does not fall within the provisions of a statute which provides that, if an employé, having "access to, control, or possession of property" belonging to his employer, appropriates such property to his own use, he shall be deemed guilty of embezzlement because something more than mere physical access, or opportunity of approach to the thing, is required. There must be a relation of special trust in regard to the article appropriated, and it must be by virtue of such trust that the employé has "access to control or possession" of it. (*Colip v. State*, 322.)

7. **LARCENY—SUFFICIENCY OF VERDICT.**—A verdict that a defendant, charged in an information with petit larceny, is "guilty as charged in the indictment," is equivalent to a finding that he is guilty of petit larceny. The misnomer of the information is a mere irregularity, by which the accused is not prejudiced. (*Colip v. State*, 322.)

8. **LARCENY—VALIDITY OF JUDGMENT—INDETERMINATE SENTENCE ACT—CONSTRUCTION OF STATUTES.**—That portion of the Indiana statute making a fine, not exceeding five hundred dollars, a part of the penalty for petit larceny, was not repealed by the Indiana indeterminate sentence act of 1897. Hence, a judgment upon a conviction for petit larceny is not erroneous because it includes a fine of one dollar, as well as the imprisonment provided for in the indeterminate sentence law. (*Colip v. State*, 322.)

See *Railroad Companies*, 19, 23, 24.

LEASES.

See Homesteads, 3; Landlord and Tenant.

LEGACY.

WILLS—CONSTRUCTION—LEGACY, WHEN VESTS.—If in a will, futurity is annexed to the substance of the gift, the vesting is suspended, but if it appears to relate to the time of payment only, the legacy vests instantan, and words directing division or distribution between two or more objects at a future time are equivalent to a direction to pay. (*Patton v. Ludington*, 910.)

See Wills.

LIBEL.

1. **LIBEL.—A CORPORATION** may become responsible for the publication of a libel, even in punitive damages. (*Peterson v. Western Union Tel. Co.*, 502.)

2. **LIBEL.—LIABILITY OF TELEGRAPH COMPANY.**—Where the agent of a telegraph company, acting within the scope of his authority, maliciously transmits a libelous message to another agent of the same company for delivery to a third person, the telegraph company is liable in punitive damages. (*Peterson v. Western Union Tel. Co.*, 502.)

3. **LIBEL.—VINDICTIVE DAMAGES** may be awarded in an action for libel, where the publication was malicious. (*Peterson v. Western Union Tel. Co.*, 502.)

4. **LIBEL.—EXCESSIVE DAMAGES.**—Where the only publication of a libelous writing has been a transmission by one agent of a telegraph company to another agent of the same company, a verdict of two thousand dollars against the telegraph company is excessive. (*Peterson v. Western Union Tel. Co.*, 502.)

5. **LIBEL.—EVIDENCE—OPINIONS.**—In an action for libel it is not competent for a witness to give his opinion, as evidence, as to the purpose of the defendant in publishing or posting the alleged libelous publication. (*Soloman v. American Mer. Exchange*, 366.)

See Boycotts, 3.

LICENSE TAX.

See Corporations, 2.

LIENS.

1. **LIENS CREATED BY STATUTE** cannot be extended by estoppel. (*Gile v. Atkins*, 341.)

2. **LIENS—COMPUTATION OF TIME.**—Under a statute creating a lien on all colts until the foal is six months old, to secure the service fee for the stallion, a colt foaled on the 12th of July becomes six months' old at the beginning of the 11th of the subsequent January, and the statutory lien upon the colt expires at that time. (*Gile v. Atkins*, 341.)

3. **LIENS—JURISDICTION OF EQUITY.**—Courts of equity, having acquired jurisdiction for other purposes, may order sales of property to satisfy liens. (*Aldine Mfg. Co. v. Phillips*, 380.)

4. **LIENS—JURISDICTION OF EQUITY TO ENFORCE.**—Courts of equity have no jurisdiction to enforce payment of liens by foreclosure upon a bill filed for that purpose only. (*Aldine Mfg. Co. v. Phillips*, 380.)

5. LIEN—JURISDICTION OF EQUITY TO FORECLOSE.—The statutory lien of a corporation upon its stock for the debt of a stockholder cannot be enforced in equity if the remedy at law is adequate. (*Aldine Mfg. Co. v. Phillips*, 380.)

6. LIENS—JURISDICTION OF EQUITY TO FORECLOSE.—Although an accounting is asked in a bill by a corporation to foreclose a lien upon stock for the debt of the stockholder, equity does not thereby acquire jurisdiction in the absence of anything to show that the claim is not one with which a court of law can deal as an open account and enforce by judgment and execution. (*Aldine Mfg. Co. v. Phillips*, 380.)

7. LIENS—RIGHT TO SELL.—A common-law lien gives the party detaining the chattel the right to hold it as a pledge or security for the debt, but not to sell it. (*Aldine Mfg. Co. v. Phillips*, 380.)

See Attorney and Client, 1; Chattel Mortgages; Executions, 12; Innkeepers, 1, 2; Judgments, 6-11; Sales, 5; Taxes, 2, 6; Vendor and Purchaser, 2, 3.

LIMITATION OF ACTIONS.

1. LIMITATION OF ACTIONS—VESTED RIGHTS—CONSTITUTIONAL LAW.—If the statute of limitations has run against a demand, the demand is gone, for the reason that the defense of the bar of the statute is a vested right which the legislature cannot take away, either by repeal or affirmative act. This rule applies whether the limitation affects real or personal property, or a claim on contract or sounding in tort. The right to the defense of the statute, when fully vested, is as valuable a property right as a right of action and is equally subject to constitutional protection. (*Eingartner v. Illinois Steel Co.*, 871.)

2. LIMITATION OF ACTIONS—VESTED RIGHTS.—A completed period of statutory limitation upon the enforcement of a claim not only takes away the remedy for such enforcement, but the claim also, and the bar of the statute becomes a vested right. (*Eingartner v. Illinois Steel Co.*, 871.)

3. LIMITATION OF ACTIONS—DEFENSE—VESTED RIGHT—CONFLICT OF LAWS.—If the operation of the statute of limitations upon the remedy is complete, the right to the benefit of the bar thus created is property, and protected as such by constitutional guaranty, like any other property, and such protection goes with its possessor into any jurisdiction into which he may travel. (*Eingartner v. Illinois Steel Co.*, 871.)

4. LIMITATION OF ACTIONS—CONFLICT OF LAWS.—If a citizen of one state having a claim against another such citizen allows the period limited by law for its enforcement to expire, he cannot then go into another state and enforce such claim in its courts. In such case the defense of the statute of limitations is a vested property right, subject to constitutional protection. (*Eingartner v. Illinois Steel Co.*, 871.)

See Trusts, 4.

MANDAMUS.

1. MANDAMUS IN AID OF EXECUTION.—Mandamus does not lie to compel a sheriff to sell real estate levied upon by him under an execution upon an ordinary money judgment. Adequate legal remedies exist at law, in such case, against the sheriff for his neglect of duty. (*State v. Cone*, 150.)

2. MANDAMUS—MATTER REQUIRING JUDGMENT OR DISCRETION.—The writ of mandamus may issue to an officer required by law to perform some ministerial duty, but not, in a matter requiring judgment or discretion, to direct or control him in the exercise of either. (*State v. Bolte*, 537.)

3. MANDAMUS—CO-ORDINATE BRANCH OF GOVERNMENT.—The judiciary cannot, by mandamus, control the action of a legislature, which is within its legislative power. (*State v. Bolte*, 537.)

4. MANDAMUS AGAINST PRESIDENT OF THE SENATE TO COMPEL HIM TO SIGN A BILL.—The action of the presiding officer of a state senate in ruling that a bill was not passed, upon the confirmation, by that body, of the report of a conference committee thereon, and in putting the question of the final passage of the bill to a vote, comes strictly within the line of his duties as president of the senate. His action, in such a case, is not ministerial, but requires judgment and discretion, and a court will not, therefore, award a mandamus to compel him to sign the bill, where it was, as amended by such report, put upon its final passage but failed to receive a constitutional majority, for it would be a gross usurpation of power for the court to assume functions which belong exclusively to the legislative body. (*State v. Bolte*, 537.)

MANSLAUGHTER.

See Homicide.

MARRIAGE AND DIVORCE.

1. MARRIAGE AND DIVORCE—RIGHT OF WIDOW TO ANNUAL DIVORCE.—An action by a wife brought after the death of her husband to annul a divorce procured by him by fraud does not affect the status of his wife under a marriage contracted after the granting of such divorce. (*Moyer v. Koontz*, 837.)

2. DIVORCE—TENANCY BY ENTIRETY.—In case of divorce between husband and wife holding land as tenants by entirety, she is entitled to receive one-half of the rents of such land so long as both live, and, upon the death of either, the entire property goes to the survivor. (*Roulston v. Hall*, 97.)

MASTER AND SERVANT.

1. MASTER AND SERVANT—RISKS ASSUMED.—A WORKMAN IN A STONE QUARRY cannot recover for injuries sustained from rock falling upon him from above caused by clay seams in the upper rock, running through it in all directions, causing it to separate, and the existence of which he knew as well as the foreman or superintendent of the quarry. (*Mielke v. Chicago etc. R. R. Co.*, 834.)

2. MASTER AND SERVANT—ASSUMPTION OF RISKS—FELLOW-SERVANTS.—A workman in a stone quarry which, by reason of blasting and removal of stone by himself and his fellow-workmen, constantly changes in its conditions and surroundings, assumes the risk of the place becoming unsafe, and cannot recover for an injury caused by the falling of a mass of stone loosened by a blast. (*Mielke v. Chicago etc. R. R. Co.*, 834.)

See Labor and Trades Unions, 2, 3.

MECHANIC'S LIEN.

1. MECHANICS' LIEN—ENTIRE CONTRACT—ONE LIEN IS SUFFICIENT, WHEN.—If bricks, used in constructing kilns, and a

press brick machine, used in pressing clay into bricks, to be burned in the kilns, were furnished to the owner of property within the statutory period before a mechanic's lien was filed, though the bricks and machine were not contracted for on the same day, they must be regarded as having been furnished under a single contract, if they were bought and furnished as parts of one general improvement of the property; if they were all necessary parts of one whole plant and were under a common roof; if the whole and all its parts were constructed at substantially the same time; and if the business of making dry pressed bricks could not be carried on until the whole plant was completed. Hence, but one account and one lien need be filed for the whole of such materials. (Progress etc. Co. v. Gratiot etc. Co., 557.)

2. MECHANIC'S LIEN—MATERIALS FURNISHED FOR BRICK MANUFACTORY AS PART OF REALTY—INTENTION OF OWNER.—As between the owner and a mechanic, who furnishes materials, everything put into and forming part of a building or machinery for manufacturing purposes, and essential to the manufactory, is a part of the freehold. Hence, one who furnished machinery and bricks to an owner, who put them into a building, is entitled to a lien therefor, where it was the owner's intention to use the machinery and bricks in converting the whole property into a plant for the manufacture of bricks, and they became a part of such plant. (Progress etc. Co. v. Gratiot etc. Co., 557.)

3. MECHANIC'S LIEN—MATERIALS FURNISHED—TEST AS TO WHETHER MACHINERY IS PART OF REALTY.—In determining whether or not machinery furnished for a building, and put therein, has become a permanent part thereof, the intention of the owner is the first and best criterion, and the adaptability of the machinery to the uses and purposes to be subserved is the next best test. (Progress etc. Co. v. Gratiot etc. Co., 557.)

4. MECHANIC'S LIEN—MATERIALS FURNISHED—RELATIVE VALUE OF MACHINERY AND BUILDING—SEPARATION.—One who furnishes machinery put into a manufacturing plant, which is suitable for the transaction of the business to be carried on in the building for which it was supplied, is entitled to a lien therefor, whatever may be the relative value of the building and machinery, or whether they can be separated easily or not. (Progress etc. Co. v. Gratiot etc. Co., 557.)

5. MECHANIC'S LIEN—MATERIALS FURNISHED FOR BRICK MANUFACTURING PLANT AS PART OF REALTY—SEPARATE PARTS ON DIFFERENT LOTS UNDER ONE ROOF. If an owner is supplied with bricks and a press brick machine, his intention being to construct a dry press brick plant, and the separate parts of the plant and the machinery are all necessary to form one complete manufacturing establishment, which would not subserve the purpose intended if any one of the parts was omitted, and the whole is manifestly adapted to that use and purpose, the machine, when put in, and also the bricks which go into the kilns and form a necessary part of the plant, become a part of the realty. The buildings, erections, and improvements on the property are, therefore, subject to a mechanic's lien for both the machine and bricks furnished, although the several parts of the plant are separate, except for the roof which covers them, and notwithstanding the fact that the parts are located upon different lots, where the owner has, by his use of the property, obliterated the lot lines, and treated the whole of it as one lot. (Progress etc. Co. v. Gratiot etc. Co., 557.)

6. MECHANIC'S LIEN—MATERIALS FURNISHED AT DIFFERENT TIMES AND UNDER DIFFERENT CONTRACTS.—It

is not necessary to the validity of a mechanic's lien that a separate account should be filed for each separate contract under which materials have been furnished within the statutory period before a lien is filed, though the contracts are independent and the materials furnished under each are different, if the materials can be considered as having been furnished under one entire contract. (*Progress etc. Co. v. Gratiot etc. Co.*, 557.)

7. MECHANIC'S LIEN—MATERIALS FURNISHED—RIGHT TO LIEN WHETHER BUILDING IS OLD OR NEW.—Under a statute, the intention of which is to give a mechanic's lien where machinery or material furnished is designed by the owner to become a part of the building, manufactory, or plant for which it was supplied, it is not important whether it is used in constructing a new building for a manufacturing plant, or is used in converting an old, existing frame house into such a plant. (*Progress etc. Co. v. Gratiot etc. Co.*, 557.)

MISTAKE.

1. MISTAKE OF FACT, WHAT IS.—A mistake of fact is an unconscious ignorance or forgetfulness of the existence or nonexistence of a fact, past or present, material to the contract. (*Kowalke v. Milwaukee etc. Ry. Co.*, 877.)

2. MISTAKE OF FACT.—THE COMPROMISE of doubtful claims for personal injury is highly favored by the law, and any contract by which there is a fair meeting of the minds of the parties to that end must be adopted by the courts. The question in each case is, Did the minds of the parties meet upon the understanding of the payment, and acceptance of something in full settlement of the defendant's liability? If they did, without fraud or unfair conduct on either side, the contract must stand, although subsequent events may show that either party made a bad bargain, because of a wrong estimate of the damages which would accrue. Such compromise cannot be avoided for a mistake of fact. (*Kowalke v. Milwaukee etc. Ry. Co.*, 877.)

3. MISTAKE OF FACT—PREGNANCY—RELEASE OF CLAIM FOR DAMAGES.—A mistake as to the pregnancy of a married woman, or a state of doubt as to such pregnancy, with a belief of the probability of its nonexistence, is not such a mistake as to an intrinsic fact as warrants the rescission of a release to a street-car company, executed by such woman, and her husband, in good faith, without fraud or unfair dealing by either party, of all claims for damages arising as the result of a fall from one of the company's cars. (*Kowalke v. Milwaukee etc. Ry. Co.*, 877.)

4. MISTAKE OF FACT, WHEN NOT RELIEVED AGAINST.—If parties have entered into a contract based upon uncertain or contingent events, purposely, as a compromise of doubtful claims arising from them, no rescission can be had on the ground of mistake of fact in the absence of bad faith, though the facts turn out very differently from the expectation of either or both of the parties. (*Kowalke v. Milwaukee etc. Ry. Co.*, 877.)

5. MISTAKE OF FACT, WHEN NOT RELIEVED AGAINST.—If a mistake is made as to some fact which, though connected with the transaction, is merely incidental, and not a part of the very subject matter or essential to any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it, the mistake is not ground for relief, either affirmative or defensive. (*Kowalke v. Milwaukee etc. Ry. Co.*, 877.)

See Banks and Banking, 11, 13; Judgments, 12.

MONOPOLIES.

1. **CONTRACTS—MONOPOLY—COMMON LAW.**—An agreement, tending to prevent competition and create a monopoly, is void by the principles of the common law, because it is against public policy. (*Harding v. American Glucose Co.*, 189.)

2. **PUBLIC POLICY—TRUSTS AND MONOPOLIES.**—The public policy of Illinois has always been against trusts and combinations, organized for the purpose of suppressing competition and creating monopoly. (*Harding v. American Glucose Co.*, 189.)

3. **CORPORATIONS—MONOPOLY—REDUCTION OF PRICES.** A corporation, organized for the purpose of controlling the manufacture and sale of a commodity is unlawful and against public policy, since its object and direct tendency are to prevent fair competition and to control prices, although the price of such commodity is in fact reduced. (*Harding v. American Glucose Co.*, 189.)

4. **MONOPOLIES—SPECIAL PRIVILEGES AT RAILWAY DEPOTS.**—It is against public policy to permit a union railway company to exclude from its station grounds all hackmen but one, to whom it has rented the exclusive privilege of standing hacks thereon and soliciting business, thus creating a monopoly and protecting a contract from which it derives revenue. (*Indianapolis Union Ry. Co. v. Dohn*, 274.)

5. **COMBINATION BETWEEN NATURAL GAS COMPANIES.** If two corporations, which have permission to supply natural gas to the people of a city, enter into an agreement with each other, fixing the price of gas to be charged to consumers, and stipulating that neither company will furnish gas to persons who are patrons of the other, such agreement is a restriction upon fair competition between the two companies, and creates, at least, a basis for a monopoly. It is, therefore, unlawful. (*State v. Portland Natural Gas etc. Co.*, 314.)

6. **CORPORATIONS—COMBINING TO FORM MONOPOLY—PUBLIC POLICY.**—Any combination of competing corporations, the necessary consequence of which is the controlling of prices, or limiting of production, or suppressing of competition, in such a way as to create a monopoly, is contrary to public policy and void. (*Harding v. American Glucose Co.*, 189.)

MORTGAGES.

MORTGAGES—TITLE OF PURCHASER—ACCOUNTING.—If a wife signs her husband's note as surety, and unites with him in the execution of a mortgage on her land to secure his debt, and he then gives a second mortgage to the same mortgagee to secure other indebtedness, and as additional security for such note, a sale under the first mortgage to pay off a balance due on the note passes title to the purchaser in fee, clear of any claim for rent or waste, but, as between the mortgagors and mortgagee, the latter is liable to account for the price of the land sold, less the amount of the note. (*Jenkins v. Daniel*, 632.)

See Judgments, 6, 9-11; Suretyship, 1; Usury, 1.

MUNICIPAL CORPORATIONS.

1. **MUNICIPAL CORPORATIONS—ABANDONMENT OF IMPROVEMENT—RECOVERY OF ASSESSMENT PAID.**—Where a municipal corporation has, after the commencement of a street improvement and after the collection of a special assessment therefor, wholly abandoned such improvement, a person, whose property

has not been benefited in any manner by the work already done, and who has, by judicial proceedings, been compelled to pay the full amount of his assessment, is entitled to recover from the city the amount paid by him, with interest, as upon a failure of consideration. (*McConville v. St. Paul*, 508.)

2. MUNICIPAL CORPORATIONS—VACATING STREETS.—The municipal authorities of a city or town have no inherent power or authority to vacate a street therein or any part thereof. (*Texarkana v. Leach*, 68.)

3. MUNICIPAL CORPORATIONS—VACATING STREETS—IN-JUNCTION.—The vacating of a street by the municipal authorities of a city or town may be enjoined by an adjacent lotowner whose property would thereby be depreciated in value, notwithstanding that it would affect many others in the same manner. (*Texarkana v. Leach*, 68.)

4. MUNICIPAL CORPORATIONS—RIGHT TO DISCHARGE SEWAGE INTO STREAM.—Every owner of land through which a stream of water flows is entitled to its reasonable use and enjoyment, including the right of drainage, though such drainage corrupts the waters of the stream and sends them on to the owner or the servient estates less pure than he received them; and a city, through which a stream of water flows, is a riparian proprietor, having a right to discharge city sewage into the stream, where no other reasonable method of disposing of it is available. (*Valparaiso v. Hagen*, 305.)

5. MUNICIPAL CORPORATIONS—RIGHT OF TO NATURAL STREAMS.—A city's lawful authority to exercise the right of eminent domain in securing an outlet for its sewage into a stream does not permit it to seize upon the stream and its margins below the outlet to relieve consequential damages. (*Valparaiso v. Hagen*, 305.)

6. MUNICIPAL CORPORATIONS—INJURY FROM BAD CONDITION OF DRAINS AND SEWERS—AREA IN STREET.—If an abutting lotowner in a city constructs an area in front of his property in the street, and such property, including the area, is occupied by a tenant, but the city so negligently constructs its sewers and drains that they will not carry off the rainfall, thus causing water to be collected in the area and discharged therefrom in great quantities, to the injury of the tenant's goods in the basement of the building, he may recover damages of the city for such injury, provided the area was properly constructed and in proper repair when the injury occurred; and the tenant cannot be held to have contributed to the injury by having merely occupied the area. (*Dell Rapids etc. Co. v. Dell Rapids*, 783.)

7. MUNICIPAL CORPORATIONS—AREA IN STREET.—AN ABUTTING LOTOWNER, assuming that he owns the soil to the center of the street, does not commit an unlawful act by constructing an area in the street in front of his property, and he has a right to use it, subject to the public easement. (*Dell Rapids etc. Co. v. Dell Rapids*, 783.)

8. MUNICIPAL CORPORATIONS—STREETS—OWNERSHIP OF SOIL.—The owner of a lot in a city is presumed to own the soil to the center of the street. (*Dell Rapids etc. Co. v. Dell Rapids*, 783.)

9. MUNICIPALITIES MAY MAINTAIN ACTIONS FOR IN-JUNCTIONS to prevent interference with their streets. (*Pewaukee v. Savoy*, 859.)

NEGLIGENCE.

1. NEGLIGENCE CAUSING DEATH—INSTRUCTIONS.—If an instruction, in an action to recover damages for death caused by

alleged negligence, limits the recovery to pecuniary damages, an objection that it does not enumerate the elements of allowable pecuniary damages is unavailing, if such a specific enumeration has not been requested. (*Malott v. Shimer*, 278.)

2. NEGLIGENCE CAUSING DEATH—SURVIVAL OF ACTION.—A statute which provides that, whenever the death of a person shall be caused by the wrongful act or neglect of another, and the act or neglect is such as would have entitled the party injured to maintain an action and recover damages therefor if death had not ensued, then the person who would have been liable if death had not ensued shall be answerable to the personal representative of the deceased, for the exclusive use of the widow and next of kin, creates a right of action, but it does not test a survival of the action in the intestate. The only relation it has with the rights of the deceased is, that its validity is to be tested by the inquiry as to whether the deceased could have maintained an action against the defendant for the injuries if he had survived them; if he could, death having ensued therefrom, his personal representative may maintain an action for the use of the widow and children. (*Malott v. Shimer*, 278.)

3. NEGLIGENCE CAUSING DEATH—EVIDENCE.—In an action to recover damages for death caused by alleged negligence, it is not necessary, to justify a verdict for more than nominal damages, that proof should be made as to how long the decedent would have been able to continue his earnings, or as to what part thereof was spent for the support of his family. (*Malott v. Shimer*, 278.)

4. NEGLIGENCE—INJURY CAUSING DEATH—RIGHT OF ACTION—MEASURE OF DAMAGES.—If a person injured by the negligence of another has brought an action to recover therefor and then died, the action can be maintained or continued only by his executor or administrator, and the measure of damage is the loss sustained by the deceased by reason of the injury. No recovery can be had for the loss sustained by third parties by reason of his death. (*McCafferty v. Pennsylvania R. R. Co.*, 690.)

5. CONTRIBUTORY NEGLIGENCE.—THE BURDEN OF PROOF as to contributory negligence is in all cases on the defendant, unless the plaintiff's own evidence establishes it. (*Pullman etc. Co. v. Adams*, 53.)

See Damages, 1; Parent and Child, 1-3; Railroads, 4, 6; Warehousemen.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS.—A note made negotiable at a particular bank, if negotiable at all, is also negotiable elsewhere. (*Stadler v. First Nat. Bank*, 582.)

2. NEGOTIABLE INSTRUMENTS—DISCOUNT—ESTOPPEL.—The rule that if a bank discounts a note payable to a third person, and negotiable in bank, the maker is estopped to set up set-offs against it, applies only to a note negotiable at the bank discounting it. (*Stadler v. First Nat. Bank*, 582.)

3. NEGOTIABLE INSTRUMENTS—STIPULATION FOR ATTORNEY'S FEE.—A note stipulating for the payment of an attorney's fee in case of suit thereon is not negotiable, under a statute providing that no note is negotiable which contains a condition not certain of fulfillment. (*Stadler v. First Nat. Bank*, 582.)

4. NEGOTIABLE INSTRUMENTS—ASSIGNMENT—SETOFF. A statute providing that "an action by an assignee of a non-negotiable chose in action is without prejudice to any setoff or

other defense existing at the time of or before notice of the assignment" does not enlarge a statute providing "that the indorsee of a non-negotiable written contract shall have all the rights of the assignor, subject to all equities existing in favor of the maker at the time of the indorsement," so as to permit the setoff against the assignee of a demand against the assignor arising intermediate the indorsement and notice thereof. (*Stadler v. First Nat. Bank*, 582.)

5. **NEGOTIABLE INSTRUMENTS—STIPULATION FOR ATTORNEY'S FEE.**—A provision in a note that it is negotiable at a particular bank is not a waiver of the effect of a stipulation for the payment of an attorney's fee in case of suit thereon which renders the note non-negotiable. (*Stadler v. First Nat. Bank*, 582.)

6. **NEGOTIABLE INSTRUMENTS — INDORSEMENT — SET-OFF.**—Under statutes making an indorsee of a non-negotiable contract subject to all equities existing at the time of the indorsement, and providing that, in an action on such assigned contract, a demand existing against the party thereto at the time of the assignment and belonging to defendant in good faith before notice of the assignment must be allowed as a counterclaim. A demand cannot be set off against the assignee unless due at the time when the assignment is made, and notice is unnecessary to prevent the setoff of a demand becoming payable subsequently. (*Stadler v. First Nat. Bank*, 582.)

7. **NEGOTIABLE INSTRUMENTS—WANT OF NOTICE OF PROTEST.**—To constitute want of notice of protest of a note a defense, it must be alleged that notice of protest was not sent, as well as that it was not received. (*Cook v. Forker*, 699.)

8. **CHECKS — INDORSEMENT — LIABILITY.**—If a check is drawn to the order of a person and indorsed by him, it is no defense to an action for money had and received on such check that he did not receive the money personally, but merely as an agent for another. (*Cook v. Forker*, 699.)

9. **NEGOTIABLE INSTRUMENTS.—THE MAKER OF A NOTE IS NOT ESTOPPED** from setting up the illegal character of its consideration, as against one who takes such note with full knowledge of what the consideration was, or as against his assignee in bankruptcy. (*Dickson v. Kittson*, 447.)

10. **NEGOTIABLE INSTRUMENTS—ONE TAKING WITH KNOWLEDGE OF CONSIDERATION.**—Where notes given for an illegal consideration are made payable to a savings bank, the trustees of which have full knowledge of the consideration, the bank does not occupy the position of an innocent indorsee, although the trustees may have thought the consideration was legal. (*Dickson v. Kittson*, 447.)

11. **NEGOTIABLE INSTRUMENTS—ACTION ON—DEMAND FOR PAYMENT.**—The payee of a promissory note is not required to make demand for payment after maturity before commencing suit thereon. (*McNair v. Moore*, 760.)

12. **NEGOTIABLE INSTRUMENTS—INTEREST AFTER MATURITY—DEFENSE.**—The maker of a note is not liable for the payment of interest on a note after maturity if, at the time of maturity and at the place designated in the note, he was ready and offered to pay the full amount due on the note. (*McNair v. Moore*, 760.)

13. **NEGOTIABLE INSTRUMENTS—PLACE OF PAYMENT.**—The dating of a note at a particular place is not sufficient to make it payable at that place. (*McNair v. Moore*, 760.)

14. **NEGOTIABLE INSTRUMENTS—JOINT OR SEVERAL NOTES—EVIDENCE.**—A note beginning "We promise to pay,"

and signed, "The Sanitary Milk Co., T. A. Houston, Trs.," is the several note of the company, and not the joint note of the company and its treasurer. Such note is not admissible under a declaration declaring upon it as the joint note of the company and its treasurer. (*Gleason v. Sanitary Milk Supply Co.*, 370.)

See Agency, 1; Checks; Usury, 3.

NEW TRIAL.

See Trial, 8.

NONRESIDENTS.

See Jurisdiction, 2, 3.

NONSUIT.

See Trial, 4.

NOTICE.

See Highways, 3; Pledge, 2; Railroads, 12; Taxes, 7; Telegraph Companies, 4.

NUISANCE.

1. **NUISANCE—LOUD NOISES IN SWITCHING CARS.**—Where the exclusive business of a street-car company is the carrying of passengers within the limits of a city, and its duty to the public requires that its car barns shall be so located that it can promptly get its cars upon its lines for the purpose of serving the public, and it is not authorized to locate its barns outside the city, the location of a barn in a residence portion of a city is not improper or unreasonable; and loud and disagreeable noises necessarily occasioned in switching cars in and out of such barn early in the morning and late at night, whereby one is disturbed in the enjoyment of his property, is not an actionable nuisance. (*Romer v. St. Paul City Ry. Co.*, 455.)

2. **NUISANCE—STORAGE OF POWDER.**—He is guilty of a nuisance who keeps in a frame warehouse within the limits of an incorporated city, in the vicinity of railroad depots and other buildings, an amount of highly explosive powder in excess of the quantity allowed to be stored therein by the laws of the state. He is subject to indictment for a misdemeanor, as well as liable in a civil action for injury to person or property caused by the nuisance. (*Cameron v. Kenyon-Connell Com. Co.*, 602.)

See Animals, 2.

OFFICERS.

See Attachment; Corporations; Counties; Detinue, 2-6; Executions, 14-19; Mandamus, 4; Trespass, 5.

PARENT AND CHILD.

1. **PARENT'S LIABILITY FOR CHILD'S NEGLIGENT USE OF A GUN.**—In an action to recover damages for injuries resulting from the reckless use of a gun by the defendant's minor son, evidence that the defendant kept a shotgun in his house which his son was permitted to use whenever he desired; that the son had frequently used the gun prior to the accident in question; that he

used it in a reckless and dangerous manner when the plaintiff was injured, and had so used it upon other occasions; and that the defendant, though he knew of his son's using the gun in a dangerous manner, permitted him to continue such use, justifies a verdict for the plaintiff. (*Johnson v. Glidden*, 795.)

2. PARENT AND CHILD—ACTION FOR NEGLIGENT USE OF GUN BY DEFENDANT'S MINOR SON.—In an action to recover for injuries caused by the alleged negligent use of a gun in the hands of the defendant's minor son, where one of the material issues is, whether the son was in the habit of using the gun in a reckless manner, it is proper to admit evidence which tends to prove that he used the gun negligently on other occasions; and the father's knowledge of his son's culpable conduct may be established by other witnesses than those who testify concerning the acts of his son. (*Johnson v. Glidden*, 795.)

3. PARENT AND CHILD—COMPLAINT FOR NEGLIGENT USE OF GUN BY DEFENDANT'S MINOR SON.—A complaint, in an action to recover damages for injuries caused by the alleged negligence of the defendant's minor son in the use of a gun, states a cause of action where it alleges that the defendant purchased the gun and gave it to his son; that the child used it negligently, which fact was known to the defendant; and that the father encouraged, countenanced, and consented to such negligent use. (*Johnson v. Glidden*, 795.)

PARTIES.

PARTIES—NONJOINER—WAIVER OF OBJECTION.—The defendants, in an action by one cotenant to recover possession of the common property, waive the right to raise the question of a defect of parties plaintiff where they fail either to demur, to set up such defect in their answer, or to ask for an instruction upon the question before the case is submitted to the jury. It is too late to raise the question on a motion for a new trial. (*Mather v. Dunn*, 788.)

See Cotenancy, 3.

PARTITION.

1. COTENANCY—PARTITION—BENEFITS AND LOSSES.—If on partition, a cotenant claims an equality of benefits, he must submit to an equality of burdens, and, if a loss results in good faith from an error of judgment on the part of the tenant in charge of the property, such loss must fall upon all of the cotenants equally. If loss is caused by the positive wrong of such cotenant, he alone must bear the loss. (*Holt v. Couch*, 648.)

2. COTENANCY—PARTITION—IMPROVEMENTS.—If property held in cotenancy is not susceptible of being divided, the court may order an account before partition, and provide for a suitable compensation for improvements to the tenant making them. (*Holt v. Couch*, 648.)

3. COTENANCY—PARTITION—IMPROVEMENTS.—Equity is effected between cotenants on partition either by assigning the improved part of the property to him who made it, at its value before the improvements were made, or, if that cannot be done, then by a reasonable allowance to the one who has enhanced the value of the property. (*Holt v. Couch*, 648.)

PARTNERSHIP.

1. PARTNERSHIP IN LANDS.—Although a partnership, as such cannot hold the legal title to land, it may in equity own real

estate without reference to the title at law, it being of no importance who holds the legal title, or how he came by it, excepting so far as these facts express or reveal the intention of the partnership. (*Rockefeller v. Dellinger*, 613.)

2. **PARTNERSHIP IN LAND—RIGHTS OF CREDITORS.**—If land is purchased by a partnership with partnership assets and for partnership purposes, and is then mortgaged in order that the partnership may obtain money for use in furthering the business of the firm, such mortgage is superior to a prior judgment against one of the members of the firm, even though none of the money realized on the mortgage is used in the partnership business. (*Rockefeller v. Dellinger*, 613.)

PLEADING.

1. **ACTIONS—PLEADING.**—The test of whether there is more than one cause of action stated, or attempted to be stated, in a complaint is not whether there are different kinds of relief or objects sought, but whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication. (*Zinc Carbonate Co. v. First Nat. Bank*, 845.)

2. **PLEADING—ALLEGATION OF—CONCLUSIONS.**—An allegation in a complaint to abate a high fence as a nuisance, that it is liable to be blown over onto plaintiff's buildings, and may injure them, is an allegation of conclusions insufficient to withstand a general demurrer. (*Bordeaux v. Greene*, 600.)

3. **PLEADING—ANSWER—WHEN DEEMED TRUE.**—When a cause is submitted to a court for decision upon bill and answer, the answer is accepted as true if its averments are not challenged by a replication. (*Kingman v. Mowry*, 169.)

4. **EQUITY PLEADING—ALTERNATIVE GROUNDS OF RELIEF.**—Where the several grounds of relief stated in a bill in equity are alternative statements of one transaction, each alternative must be sufficient to give relief, or the whole bill is bad. (*Allen v. Caylor*, 31.)

5. **PLEADING IN THE ALTERNATIVE.**—If a pleader is in doubt whether he is entitled to one kind of relief or another upon the facts alleged in the bill, he may frame his prayer in the alternative, so that if he is not entitled to one he may obtain the other, and, if he is entitled to either kind of relief prayed, the defendant cannot demur to the bill, because the complainant is not entitled to the other. His remedy is to insist at the hearing that complainant be confined to such relief only as he may be entitled to under all the circumstances of the case as then presented. (*Florida Southern R. R. Co. v. Hill*, 124.)

6. **PLEADING.—A DEMURRER**, which is directed merely to the want of jurisdiction and to the insufficiency of facts stated to constitute a cause of action, does not reach the objection that there is a nonjoinder or misjoinder of parties. (*Svanburg v. Fosseen*, 490.)

7. **PLEADING—DEMURRING AND ANSWERING.**—The defendant may not answer and demur also to the same part of a bill. If he demur to a part and answer to the same part, the demurrer in such case is overruled by the answer. (*Harding v. American Glucose Co.*, 189.)

8. **EQUITY PLEADING—WHEN BILL INSUFFICIENT.**—A bill in equity is fatally defective unless it states the title or claim of the complainant with such certainty and clearness that the defendant may be distinctly informed of the nature of the case which he is called upon to meet. (*Merrell v. Witherby*, 39.)

9. PLEADING—GAMBLING TRANSACTION.—To make the defense that an agreement is a gambling transaction, a defendant must set up such illegality in his answer. (*Van Duzen-Harrington Co. v. Jungeblut*, 463.)

10. PLEADING—JOINDER OF COUNTS.—A special count in assumpsit may be joined with the common counts. (*Carland v. Western Union Tel. Co.*, 394.)

11. PLEADING TO ENFORCE BREACH OF CONDITION SUBSEQUENT.—A complaint must exhibit a complete right of action. Hence, in an action by a grantor to recover an estate claimed to have been forfeited by reason of the breach of a condition subsequent contained in the deed, the complaint is insufficient, if it fails to allege re-entry, or its equivalent, that re-entry was prevented and that possession was demanded and refused. (*Preston v. Bosworth*, 313.)

12. PLEADING.—THE SUFFICIENCY OF A COUNT must be determined by its own allegations, without aid from another count. (*State v. Langford*, 746.)

13. PLEADING—STRIKING OUT SURREJOINDER.—A surrejoinder which is but a repetition of a previous replication should be stricken out on motion. (*Western Assur. Co. v. Hall*, 48.)

See *Detinue*, 4, 6; *Indictments*, 2; *Insurance*, 24; *Parent and Child*, 3.

PLEDGE.

1. CORPORATION—STOCK—PLEDGE—WRONGFUL SALE. If a pledgee of corporate stock illegally sells it, the pledgor may sue for its conversion, without tendering the debt or demanding a return of the stock. In such action the pledgee has the right to recoup the amount of the debt. (*Feige v. Burt*, 390.)

2. CORPORATIONS—STOCK—PLEDGE—SALE WITHOUT NOTICE.—If corporate stock is pledged for the payment of a debt, it may, in case of default, be sold by the pledgee, without judicial proceedings, upon notice to the pledgor, but such sale without notice is a conversion of the stock. (*Feige v. Burt*, 390.)

See *Corporations*, 4; *Fraudulent Conveyances*, 1.

POLITICAL CONVENTIONS.

See *Elections*, 1-3.

POOLSELLING.

See *Gaming*, 1.

PRIVILEGED COMMUNICATIONS.

See *Evidence*, 3, 4; *Witnesses*, 5-7.

PROBATE COURT.

See *Judicial Sales*.

PROCESS.

1. PROCESS—EXEMPTION FROM SERVICE—PRISONER IN JAIL.—The reasons for exemption from civil arrest and from service of any civil process of nonresident parties, and witnesses voluntarily attending court, do not apply to persons arrested and in jail under a criminal proceeding. (*White v. Underwood*, 630.)

2. PROCESS—SERVICE OF IN JAIL.—The sheriff has authority to serve process in jail as well as elsewhere. The jail possesses no "privilege of a sanctuary," and service of process upon a prisoner confined therein is valid. (*White v. Underwood*, 630.)

PUBLIC POLICY.

THE PUBLIC POLICY OF A STATE is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts, and in the constant practice of government officials. (*Harding v. American Glucose Co.*, 189.)

See Monopolies, 2, 6.

QUO WARRANTO.

1. QUO WARRANTO AS A REMEDY FOR ABUSE OF CORPORATE POWERS.—An information in the nature of a quo warranto is not only an appropriate means of testing the right to exercise corporate franchises, but is also a proper remedy for the abuse, by a corporation, of the powers with which it has been invested. (*State v. Portland Natural Gas etc. Co.*, 314.)

2. QUO WARRANTO AGAINST PUBLIC CORPORATION—JUDGMENT OF FORFEITURE.—In a quo warranto proceeding against a corporation engaged in furnishing natural gas to the inhabitants of a city, the court may, in the exercise of its discretion, upon proof that the defendant entered into an agreement with a competing company, fixing the price of gas to be charged to consumers, render a judgment declaring a forfeiture of the defendant's corporate franchise, or it may render a judgment of forfeiture or ouster only of the defendant's right to carry out the illegal agreement. (*State v. Portland Natural Gas etc. Co.*, 314.)

RAILROAD COMPANIES.

1. RAILROADS—WHAT ARE RAILROAD CARS.—The words "railroad cars," in their general sense, include "hand-cars." Hence, under a statute giving a right of action to an employé who, while "engaged in operating, running, riding upon, or switching passenger or freight or other trains, engines, or cars," has been injured through the negligence of a coemployé, the words "or other cars" include hand-cars, and an employé operating a hand-car may maintain an action against the company. (*Benson v. Chicago etc. R. R. Co.*, 444.)

2. RAILROADS — INJUNCTION TO COERCE COMPENSATION FOR LAND TORTIOUSLY TAKEN.—If a landowner waives the tortious taking of his property for a right of way by a railroad company, and elects to regard the act of the company as done under the right of eminent domain, he is estopped from dispossessing the company, and is not entitled to an injunction to coerce payment of compensation due for such land. In such case, a court of equity may declare the amount due for compensation to be a lien upon the land and improvements, and decree foreclosure of the lien and sale of the property to satisfy such amount. (*Florida Southern R. R. Co. v. Hill*, 124.)

3. RAILROADS—LIABILITY IN EQUITY FOR LAND TORTIOUSLY TAKEN.—If a landowner waives the tortious taking of his property for the purpose of a right of way by a railroad company and elects to regard the act of the company as done under the right of eminent domain, he is entitled to recover compensation for the land thus taken. In such case, the landowner has an equitable lien in the nature of a vendor's lien, and may resort to equity

in the first instance to establish the amount justly due him as compensation, and to enforce his lien by charging the company's interest in the land and the improvements thereon for its payment. (*Florida Southern R. R. Co. v. Hill*, 124.)

4. RAILROADS—PRESUMPTION OF NEGLIGENCE FROM INJURY.—The injury of a passenger on a railroad is *prima facie* evidence of negligence in the management of the road, which evidence the railroad company is bound to rebut. (*Steele v. Southern Ry.*, 756.)

5. RAILROADS — INJURY TO PASSENGER—PROXIMATE CAUSE OF DEATH.—If a passenger injured on a railway dies more than a year after the accident, the immediate cause of death being an abscess of the liver, and the evidence shows that he had never recovered from the effects of the accident, that he had *la grippe* one month before he died, that the injury received in the accident was apparently internal and indicated a serious derangement of the liver before the attack of *la grippe*, the question of the proximate cause of the death is for the jury to determine. (*McCafferty v. Pennsylvania R. R. Co.*, 690.)

6. RAILROAD ACCIDENT — PRESUMPTION OF NEGLIGENCE.—An injury to a railway passenger caused by a defect in the track raises a presumption of negligence against the railway company, which carries the case to the jury, although the evidence to rebut such presumption may be very strong. (*McCafferty v. Pennsylvania R. R. Co.*, 690.)

7. RAILROADS—CONTRACT OF INDEMNITY—RIGHT TO MAKE.—While a railroad company will not be permitted by contract, or otherwise, to exempt itself from liability for losses caused by its own negligence, or that of its servants, there is nothing to prohibit it from contracting with a third person for indemnity against these very same losses. It may, therefore, by such a contract, indemnify itself against loss for injuries to passengers, though the injury is caused by its own negligence, or that of its servants or employes. The indemnity in no way affects the liability of the company to the person injured. (*Kansas City etc. R. R. Co. v. Southern Ry. etc. Co.*, 545.)

8. RAILROADS — DUTY TO PASSENGER ON FREIGHT TRAIN.—A carrier of a passenger on a freight train is bound to exercise the highest degree of care consistent with the practical and efficient use of the train for its primary purpose of transporting freight, and a passenger thereon assumes such inconvenience and risks as usually attend the operation of such train. (*Steele v. Southern Ry.*, 756.)

9. RAILROADS — SPECIAL PRIVILEGES ON STATION GROUNDS.—A company organized under a statute providing for the incorporation of union railway companies has an undoubted right to make rules and regulations concerning the use of its station and grounds, but it has no power, under the guise of such rules and regulations, to grant to a transfer company the exclusive privilege of standing hacks upon its station grounds, and soliciting business. (*Indianapolis Union Ry. Co. v. Dohn*, 274.)

10. RAILROADS — CONTRACT OF INDEMNITY — PUBLIC POLICY.—A contract between a railroad company and a news company, whereby the former, for a valuable consideration, grants to the latter the privilege of selling "periodicals, newspapers, books, confections, fruits, cigars, cakes, pies, and sandwiches," upon its regular passenger trains, during a time specified, and which contains a clause stipulating that the news company shall indemnify the railroad company against any loss which it may sustain by

reason of injuries to person or property, suffered or sustained by any agent or employé of the news company, whether such loss or injuries arise from the negligence of the employés of the railroad company, or otherwise, is not against public policy, but is a valid and enforceable contract. It is not an attempt by the railroad company to limit its liability to passengers for injuries caused by the negligence of its servants, but is a contract to indemnify that company for the sums it must pay on account of its negligence. (*Kansas City etc. R. R. Co. v. Southern Ry. etc. Co.*, 545.)

11. RAILROADS—CONTRACT OF INDEMNITY—RECOVERY UPON.—If a news company agrees, for a valuable consideration, to indemnify a railroad company for any loss it may sustain by reason of having to pay for an injury to any agent or employé of the news company while upon the cars of the railroad company, and a newsboy, in the employ of the news company, receives injuries resulting in death while on the railroad company's train, through the negligence of its servants, and during the time that such contract is in force, the railroad company is entitled to recover, where it pays a judgment obtained against it in a suit brought by the boy's legal representative, and then sues upon the contract of indemnity with the news company, to recover the amount of the judgment. The news company would not, however, be liable on the contract sued on, if the boy was killed while acting as a "lookout" on the railroad company's train, and while outside of his employment as news agent. (*Kansas City etc. R. R. Co. v. Southern Ry. etc. Co.*, 545.)

12. RAILROADS—CONTRACT OF INDEMNITY—PENDENCY OF LITIGATION—EFFECT OF NOTICE OF, AS TO INDEMNITOR.—If one is bound to protect another from a liability, he is bound by the result of a litigation to which such other is a party, where he had notice of the suit and an opportunity to control and manage it. Hence, where a defendant news company was notified of the pendency of a litigation which resulted in a judgment against the plaintiff railway company, on a liability against which the defendant, by its contract, had agreed to indemnify it, and was afforded ample opportunity to control and manage that litigation, but refused to have anything to do with the defense of the case or settlement of the claim, it is bound by such judgment, though it is the result of a compromise. (*Kansas City etc. R. R. Co. v. Southern Ry. etc. Co.*, 545.)

13. RAILROADS—CONTRACT OF INDEMNITY—JUDGMENT BY CONSENT BINDS INDEMNITOR.—When a news company has agreed to indemnify a railroad company for any loss it may sustain by reason of an injury to any agent or employé of the news company while upon the cars, and an accident occurs on the railway which subjects the railroad company to a liability for which it is sued, the fact that the railroad company compromises the claim without the assent of the news company, and consents to a judgment against itself for the amount agreed upon, does not render such a judgment erroneous, where the settlement was made in good faith and the amount of the judgment was reasonable. The only effect that the railroad company's consent to the rendition of the judgment could have, would be to reduce the judgment from conclusive to presumptive evidence only of the news company's liability on its contract, and of the amount thereof, and to afford it the right and privilege of showing either that the judgment was procured by a fraudulent collusion, was not founded upon a legal liability, or that it exceeded such liability. (*Kansas City etc. R. R. Co. v. Southern Ry. etc. Co.*, 545.)

14. STREET RAILWAYS—POWER TO LAY SWITCHES AND CURVES.—Where a street railway company is authorized to operate its system along certain streets of a city, and to make connections with its power-houses and car barns, it has power to lay switches and curves for the purpose of getting its cars in and out of its barns upon any of the streets adjoining its barns, and is not confined to the streets upon which it is expressly authorized to operate its system. (*Romer v. St. Paul City Ry. Co.*, 455.)

15. STREET RAILWAYS — SWITCHES NOT ADDITIONAL BURDEN ON STREET.—The maintenance and use of switches and curves, which are a necessary incident to the operation of a street-car system, are a proper street use and not an additional burden thereon. (*Romer v. St. Paul City Ry. Co.*, 455.)

16. RAILROADS—STREET—DRIVING ON TRACK.—A person has the lawful right to drive his carriage in the tracks of a street-car company, if he exercises due care to avoid an undue interference with its rights and to avoid a collision. (*North Chicago St. R. R. Co. v. Zeiger*, 157.)

17. SLEEPING-CAR COMPANIES—DUTY GENERALLY.—A sleeping-car company is bound to furnish a passenger with a berth for his accommodation, and to keep watch and take reasonable care that he suffers no loss. (*Pullman etc. Co. v. Adams*, 53.)

18. SLEEPING-CAR COMPANIES are not held to the responsibility of common carriers and innkeepers. (*Pullman etc. Co. v. Adams*, 53.)

19. SLEEPING-CAR COMPANIES—LIABILITY FOR LOSS OF RING.—Where a passenger takes off at night a ring which he is accustomed to wear, and puts it in a pocket-book, which book is stolen from his berth, this is not such contributory negligence as to preclude a recovery against the company. (*Pullman etc. Co. v. Adams*, 53.)

20. SLEEPING-CAR COMPANIES—NEGLIGENCE OF ONE'S SLEEPING COMPANION.—Where a passenger's property has been stolen through the negligence of the sleeping-car company, the fact that his traveling companion, who occupied the berth with him, was negligent in reference to the property does not relieve the company from liability. (*Pullman etc. Co. v. Adams*, 53.)

21. SLEEPING-CAR COMPANIES—PROTECTION OF PROPERTY IN A BERTH.—The law draws no distinction as to places of safety in the berth of a sleeping-car, and property placed anywhere in a berth is entitled to protection. (*Pullman etc. Co. v. Adams*, 53.)

22. SLEEPING-CAR COMPANIES—LIABILITY FOR LOSS OF PASSENGER'S PERSONAL EFFECTS.—The liability of a sleeping-car company for the loss of a passenger's personal effects does not include anything except the clothing, ornaments, and such articles as are usually carried by travelers in their hands, together with a sum of money reasonably sufficient for the expenses of the journey in which one is engaged. (*Pullman etc. Co. v. Adams*, 53.)

23. SLEEPING-CAR COMPANIES—LIABILITY FOR LOSS OF VALUABLE RING.—A sleeping-car company is not liable for the theft of a diamond ring from the purse of a sleeping passenger, where, because of a loose setting, the ring was not in a condition to be worn for the use, convenience, or ornament of the passenger. (*Pullman etc. Co. v. Adams*, 53.)

24. SLEEPING-CAR COMPANIES—LIABILITY FOR THEFT. A sleeping-car company is under a duty to use reasonable care to guard its passengers from theft, and if, through want of such care, the personal effects of a passenger, such as he might reasonably

carry with him, are stolen, the company is liable. (Pullman etc. Co. v. Adams, 53.)

25. SLEEPING-CAR COMPANIES—CARE IN THE NIGHT-TIME.—The care required of a sleeping-car company to secure the safety of its passengers in the night-time necessitates that the watching should be continuous and active. (Pullman etc. Co. v. Adams, 53.)

RECEIPTS.

See Taxes, 4.

RECEIVERS.

RECEIVERS—SUIT AGAINST, WITHOUT LEAVE.—A federal receiver for a railroad company may be sued in a state court, without previous leave of the court which appointed him, for damages on account of the death of an employé of the receiver, caused by the latter's alleged negligence while operating the road. (Malott v. Shimer, 278.)

REDEMPTION.

See Taxes, 7.

REFEREES.

See Appeal, 4; Arbitration.

REMAINDERS.

See Devise, 1-5; Wills, 2.

REPLEVIN.

See Attachment, 2.

RESTRAINT OF TRADE.

See Contracts, 5.

RIPARIAN PROPRIETORS.

See Estoppel, 2; Waters and Watercourses.

SALES.

1. SALES—DELAY IN SHIPMENT—LIABILITY FOR PRICE. A sale of goods by a merchant in one state to a merchant in another, "to be shipped prompt," means that the goods will be shipped from the seller's warehouse in the state of his place of business so that they will arrive at the buyer's place of business with reasonable dispatch and, unless so shipped, the title to the goods does not pass to the buyer, and he is not liable on his contract of purchase. In such case, a month's delay in the arrival of the goods is unreasonable and avoids the sale. (Soper v. Creighton, 375.)

2. SALES—DELIVERY—ACTION FOR PURCHASE PRICE.—If the delivery of goods sold is unconditional, the vendor is entitled to the contract price, but, if the delivery is conditional, the price named in the condition only can be recovered. (Greenleaf v. Gallagher, 371.)

3. SALES—DELIVERY—ACTION FOR PURCHASE PRICE.—In order to maintain an action for the contract price of goods sold and delivered, actual delivery to, and acceptance by, the purchaser is

necessary, and if the title to the goods only has passed subject to the vendor's lien for the price, this form of action cannot be maintained. (*Greenleaf v. Gallagher*, 371.)

4. SALES—DELIVERY—ACTION FOR PURCHASE PRICE.—An action for the price of goods sold cannot be maintained until delivery is proved. Proof of tender and refusal is not sufficient. (*Greenleaf v. Gallagher*, 371.)

5. SALES — DELIVERY — VENDOR'S LIEN—ACTION FOR PURCHASE PRICE.—If the title to goods sold has passed subject to the vendor's lien for the price, his remedy is for a breach of the contract of bargain and sale, and the rule of damages in his favor is not the contract price, but the difference between that and the value of the goods retained. (*Greenleaf v. Gallagher*, 371.)

See Corporations, 18; Pledge, 1, 2; Vendor and Purchaser.

SAVINGS BANKS.

See Banks and Banking, 14.

SCIRE FACIAS.

See Executions, 11.

SELF-DEFENSE.

See Homicide, 3.

SENTENCES.

See Criminal Law, 1, 2; Larceny, 8; Trial, 8.

SETOFF.

1. SETOFF—INSOLVENCY.—Equitable setoff against the indorsee or assignee of a non-negotiable note before maturity, of demand deposits due from the payee bank cannot be allowed on the ground that, by reason of the bank's insolvency at the time of the transfer, the deposits were due without further demand, if the bank, though in fact insolvent, was still open transacting business, and paying its debts at maturity. (*Stadler v. First Nat. Bank*, 582.)

2. SETOFF.—TIME CERTIFICATES OF DEPOSIT by the maker of a non-negotiable note with the payee bank cannot be set off in equity against the indorsee or assignee of the note, if they were not due at the time of the transfer, even if the payee bank was then insolvent. (*Stadler v. First Nat. Bank*, 582.)

3. SETOFF.—TIME CERTIFICATES OF DEPOSIT by a maker of a non-negotiable note with the payee bank, whether due or not at the time of a transfer of the note to a third person, are not legal setoffs, if the note was not due when transferred. (*Stadler v. First Nat. Bank*, 582.)

See Corporations, 13; Negotiable Instruments, 4, 6.

SHERIFFS' DEEDS.

See Executions, 15-19.

SLEEPING-CAR COMPANIES.

See Railroad Companies, 19-25.

SPECIFIC PERFORMANCE.

1. CONTRACTS—MUTUALITY—SPECIFIC PERFORMANCE. The principle that contracts must be mutual—must bind both parties or neither—does not mean that in every case each party must have the same remedy for a breach by the other, but that the contract is enforceable on both sides in some manner; not necessarily enforceable on both sides by specific performance. (Northern Cent. Ry. Co. v. Walworth, 683.)

2. SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF CHATTELS.—The rule that a bill in equity cannot be maintained for the specific performance of a contract for the sale of chattels does not apply if the articles sold are of such a nature that they cannot be purchased in the market. (Northern Cent. Ry. Co. v. Walworth, 683.)

3. SPECIFIC PERFORMANCE—SALE OF STOCKS AND BONDS.—The subsequent sale and delivery of stocks and bonds to other parties in disregard of a prior contract with the plaintiff, is no defense to a bill for specific performance, especially when such parties had knowledge of the prior contract, and are made parties and sought to be enjoined. (Northern Cent. Ry. Co. v. Walworth, 683.)

4. SPECIFIC PERFORMANCE — CONTRACT FOR PURCHASE OF STOCK.—A contract for the sale of nearly all of the bonds and stock of a corporation with an agreement that the vendor shall pay the interest and floating corporate debt, and use his best endeavors to secure to the vendee the remaining corporate stock and bonds at the lowest possible price, does not lack mutuality, and may be specifically enforced. (Northern Cent. Ry. Co. v. Walworth, 683.)

5. SPECIFIC PERFORMANCE—ORAL CONTRACT TO CONVEY LANDS.—Where an uncle and aunt take three infant nieces into their family, upon an oral agreement that the nieces shall give their services until grown up, and the uncle and aunt will leave to them all their real and personal property which they might own at the time of their death, the services to be performed by the nieces are of such a character that a performance entitles them, upon the death of the uncle and aunt, to a specific performance of the promise to convey the property. (Svanburg v. Fosseen, 490.)

6. SPECIFIC PERFORMANCE OF ORAL CONTRACT TO CONVEY REAL PROPERTY.—Where the consideration for the purchase of lands consists of services to be rendered, which are of such a peculiar character that it is impossible to estimate their value to the vendor by a pecuniary standard, and he did not intend to measure them by such a standard, the performance of the services entitles the vendee to a specific performance, notwithstanding the contract was in parol. (Svanburg v. Fosseen, 490.)

STARE DECISIS.

See Appeal, 3.

STATUTE OF FRAUDS.

See Contracts, 1, 2; Vendor and Purchaser, 2, 4, 5.

STATUTES.

1. CONSTITUTIONAL LAW — TITLE OF ACT—UNITY OF SUBJECT—APPROPRIATIONS.—Under a constitutional provision

that no statute shall relate to more than one subject, which must be expressed in its title, the unity of the subject of an appropriation bill or statute is not broken by appropriating several sums for specific objects, which are necessary or convenient, or tend to the accomplishment of one general design, notwithstanding other purposes than the main design may be thereby subserved. (*State v. Sloan*, 106.)

2. **CONSTITUTIONAL LAW—ENACTMENT OF STATUTE—NECESSARY EXPENSE OF GOVERNMENT.**—If a statute making an appropriation for building a state capitol receives a mere majority of the votes of both houses of the legislature, and the presiding officers thereof decide that the statute has received the majority necessary to its passage, and no appeal is taken from that decision, it must be presumed that the legislature has ratified the acts of its officers, thereby declaring that the statute is constitutionally passed, and that the building of such state capitol is a necessary expense of government. (*State v. Sloan*, 106.)

3. **CONSTITUTIONAL LAW—APPROPRIATION STATUTE—UNITY OF SUBJECT.**—A statute authorizing the building of a state capitol upon the ground now occupied by the state penitentiary, and making an appropriation therefor, and also authorizing the penitentiary board to procure new grounds and build a new penitentiary, and to pay therefor out of the fund at its disposal at the time the statute is passed, is valid, and not unconstitutional as embracing two subjects of appropriations in one statute. (*State v. Sloan*, 106.)

4. **CONSTITUTIONAL LAW—NECESSARY EXPENSES OF GOVERNMENT.**—Power delegated by the constitution to the legislature to appropriate money to defray the necessary expenses of government carries with it the right to determine what is a necessary expense. (*State v. Sloan*, 106.)

5. **CONVEYANCES—CURATIVE ACTS.**—A conveyance of a homestead, invalid because defectively acknowledged by the wife, is made valid by a statute, subsequently enacted, providing that conveyances, "the proof of execution whereof is insufficient, because the officer certifying such execution omitted any words in his certificate, or is otherwise informal, shall be as valid and binding as though the certificate of acknowledgment of proof of execution was in due form." (*Williamson v. Lazarus*, 91.)

6. **A STATUTE IN MODIFICATION OR DEROGATION OF THE COMMON LAW** will not be presumed to alter it further than is expressly declared. (*Kidd v. Bates*, 17.)

7. **STATUTES ADOPTED FROM OTHER STATES.**—If the legislature adopts a statute from another state, it must ordinarily be presumed to have adopted such statute with the interpretation theretofore given it by the courts of that state. (*Stadler v. First Nat. Bank*, 582.)

8. **STATUTES—CONSTRUCTION—SPIRIT OF LAW.**—A court, in construing a statute, is not at liberty to disregard its plain and express terms upon any theory as to its spirit. When it is plain and unambiguous, courts are not permitted to search for its meaning beyond the statute itself. (*Witte v. Koeppen*, 826.)

9. **CONSTITUTIONAL LAW—WEIGHING GRAIN—POWER OF LEGISLATURE.**—A statute is in excess of the powers of a legislature which makes conclusive the action of a state weighmaster in weighing grain at terminal elevators. Such a law is an arbitrary exercise of power, and attempts to deprive a person of his day in court by closing his mouth absolutely when he comes into court. (*Vega Steamship Co. v. Consolidated Elev. Co.*, 484.)

STOCK.

See Corporations; Pledge, 1, 2; Specific Performance, 3-6.

STREET RAILWAY COMPANIES.

See Railroad Companies, 14-16.

SUBROGATION.

See Carriers; Vendor and Purchaser, 3.

SUNDAY.

1. **CONTRACTS MADE ON SUNDAY—RATIFICATION.**—If a note is discounted on Sunday and a check given for the proceeds thereof and indorsed on the same day, but not drawn until a following and legal day, the transaction is thereby ratified and affirmed as a whole, and constitutes a legal and binding loan of the money. (Cook v. Forker, 699.)

2. **CONTRACTS MADE ON SUNDAY—RATIFICATION.**—Contracts made on Sunday are not void in the sense that they do not admit of ratification, though so long as they are executory their enforcement must be refused. Acts of ratification make them new contracts, which the parties are bound to perform. (Cook v. Forker, 699.)

SURETYSHIP.

1. **SURETYSHIP — MORTGAGE TO SECURE SECURED DEBT—COLLATERAL SECURITY.**—If a mortgage is given by the principal debtor to secure other indebtedness, and a former secured debt is included in the mortgage, the foreclosure of which is at a later date than the maturity of the doubly secured debt, the mortgage must be held to be collateral security to the doubly secured debt only, and not an extension of time releasing the surety, in the absence of an agreement to the contrary. (Jenkins v. Daniel, 632.)

2. **SURETYSHIP—RELEASE OF SURETY—EXTENSION OF TIME.**—An extension of time, without the consent of the surety, discharges him or the security given by a third party. (Jenkins v. Daniel, 632.)

3. **SURETYSHIP—RELEASE OF SURETY BY EXTENSION OF TIME.**—If a wife unites with her husband in the execution of a mortgage on her land to secure his debt, and signs his note as surety therefor, any extension of the time for payment without her consent discharges the lien on her land. After such extension the mortgagee has no right to sell the land, and the purchaser at the sale acquires no title. (Jenkins v. Daniel, 632.)

4. **SURETYSHIP.—THE DISCHARGE OF THE PRINCIPAL** in a bond, by operation of law, does not discharge the sureties therein. (Whereatt v. Ellis, 865.)

5. **SURETYSHIP—LIABILITY OF SURETY FOR INTEREST.** Interest on the penalty in an appeal bond, conditioned for the payment of any judgment recovered against appellant in the trial court, commences from the date of such judgment to run against his sureties on the amount of the penalty, when the damages recovered in the trial court exceed the amount of such penalty. (Whereatt v. Ellis, 865.)

6. **SURETYSHIP—LIABILITY OF SURETY FOR INTEREST—DEMAND.**—If a demand upon the principal is necessary to start interest running against him, it is necessary as to his sureties. If

the claim is wholly unliquidated so that a demand will not start interest against the principal, it will not start it against his sureties. (*Whereatt v. Ellis*, 865.)

7. BONDS—DAMAGES FOR BREACH—AMOUNT RECOVERABLE AGAINST SURETIES—INTEREST.—If the circumstances are such that the principal is chargeable with interest on the damages accruing from the breach of an appeal bond, and such damages are equal to or exceed the penalty named in the bond, the interest period on such penalty commences at the same time as that against the principal on such damages, and when the bond is breached, the penalty, to the amount of the damages, immediately becomes the debt of the sureties, and bears interest the same in all respects as any other debt due on contract, if the principal claim bears interest. (*Whereatt v. Ellis*, 865.)

8. BONDS—AMOUNT RECOVERABLE.—If the damages to secure which a penal bond is given exceed the penalty and draw interest, the penalty also draws interest, and the recovery against the sureties may include both the penalty and such interest. (*Whereatt v. Ellis*, 865.)

See Appeal, 16-23; Executors and Administrators, 4, 6.

TAXES.

1. TAXES ARE NOT "DEBTS," within the meaning of a statute which exempts timber culture claims from debts contracted prior to the issuing of the final certificate. (*Danforth v. McCook County*, 808.)

2. TAXES UPON PERSONAL PROPERTY—LIEN FOR, UPON LAND SUBSEQUENTLY ACQUIRED—TIMBER CULTURE CLAIM.—Under a statute which makes personal property taxes a lien on real estate owned or thereafter acquired by the person assessed, a timber culture claim is, after the issuance of the final certificate, subject to a lien for personal property taxes assessed to the owner before the issuance of the certificate, because the land, after the entry, is private property. (*Danforth v. McCook County*, 808.)

3. TAXES—RECEIPT AS EVIDENCE—REDEMPTION AS EVIDENCE OF PAYMENT.—A STATUTE making a tax receipt conclusive evidence that all prior taxes have been paid applies only to the payment of taxes in the ordinary way, and cannot be extended to a redemption of property from a tax sale. In other words, such redemption is not conclusive evidence that all prior taxes have been paid. (*Danforth v. McCook County*, 808.)

4. TAXES—RECEIPT AS EVIDENCE—PAYMENT BEFORE LAW WAS APPROVED.—A STATUTE providing that a tax receipt shall be conclusive evidence that all prior taxes have been paid does not apply to a payment made before the law was approved, or to a receipt for such payment. (*Danforth v. McCook County*, 808.)

5. TAXES UPON PERSONAL PROPERTY—SALE OF LAND FOR—WHAT DOES NOT INVALIDATE.—A sale of land for personal property taxes is not void, under the statutes of South Dakota, because of an officer's failure to collect such taxes by distraint and sale of personal property, or by his failure to make a return showing that he cannot make such taxes out of the personal property of the person owing them. (*Danforth v. McCook County*, 808.)

6. TAXES UPON PERSONAL PROPERTY—LIEN FOR—SUBSEQUENT STATUTE.—A statute which prescribes a mode of making assessments, and the levy and collection of taxes, does not affect personal property taxes which became a lien before the passage of the statute. (*Danforth v. McCook County*, 808.)

7. TAX SALE.—A NOTICE OF THE EXPIRATION OF THE TIME TO REDEEM from a tax sale stating "that the time allowed by law for redemption from said sale will have expired after sixty days have elapsed after service of this notice has been made, and proof thereof and of the sheriff's fees has been filed in this office," is void, because it fails to state when the time to redeem will expire. (*Mather v. Curley*, 462.)

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES—CIPHER MESSAGES.—The meaning of a cipher telegram may be shown by the sender. (*Carland v. Western Union Tel. Co.*, 394.)

2. TELEGRAPH COMPANIES—NONDELIVERY OF MESSAGE.—A statement by a telegraph operator to the sender of a telegram that it has not been delivered, made as a report of his effort to trace it, is admissible in evidence to show nondelivery. (*Carland v. Western Union Tel. Co.*, 394.)

3. TELEGRAPH COMPANIES.—A TELEGRAPH OPERATOR IS THE AGENT of the company, and not of the sender, in receiving a message by telephone to be transmitted, if the sender is ignorant of a regulation of the company requiring all messages to be given to such agent in writing. (*Carland v. Western Union Tel. Co.*, 394.)

4. TELEGRAPH COMPANIES—RULES AND REGULATIONS—NOTICE TO SENDER.—The sender of a telegraphic message is not bound by the rules and regulations of the company of which he has no notice. (*Carland v. Western Union Tel. Co.*, 394.)

5. TELEGRAPH COMPANIES—DAMAGES FOR FAILURE TO TRANSMIT MESSAGE.—Assumpsit may be maintained against a telegraph company to recover damages for its failure to transmit and deliver a message. (*Carland v. Western Union Tel. Co.*, 394.)

See Libel, 2.

TIME.

See Liens, 2.

TORTS.

See Corporations, 6-8.

TRESPASS.

1. TRESPASS—FORCIBLE—WHAT IS NOT.—An unforbidden entry and holding possession of the premises of another, without any demonstration of force, is not a forcible trespass. (*State v. Hawkins*, 669.)

2. TRESPASS, FORCIBLE.—TO CONSTITUTE the criminal offense of forcible trespass upon the premises of another, there must be a forbidden entry or detention with demonstration of force, directly tending to a breach of the peace, and calculated to intimidate or put in fear. (*State v. Hawkins*, 669.)

3. AN INDICTMENT FOR FORCIBLE TRESPASS must charge it to have been committed, not only with force and arms, but also with a strong hand. (*State v. Hawkins*, 669.)

4. TRESPASS—SALE OF GROWING TIMBER.—If one in adverse possession of land sells the timber growing thereon, which is cut and removed, and takes the purchaser's note for the price thereof, but is afterward ejected by the true owner, the latter can-

not maintain an action to recover possession of such note, nor to recover the price of such timber. His remedy is an action in trespass for the damages done to his land by such person while in possession. (*White v. Fox*, 654.)

5. **TRESPASS—SEIZURE OF PROPERTY IN DETINUE—JUSTIFICATION OF OFFICER—PLEADING.**—In an action of trespass for the wrongful seizure of property under a writ issued on a judgment in detinue, a plea of justification, which shows that the plaintiff was not a party to the writ, is insufficient without an averment of facts to show that the property was, notwithstanding, subject to seizure while in his possession. (*West v. Hayes*, 24.)

TRIAL.

1. **TRIAL—DEMURRER TO EVIDENCE.**—A plaintiff is entitled to have drawn from the evidence adduced every reasonable intendment in his favor. Hence, if, from all the facts disclosed, there is any substantial evidence tending to show that he is entitled to recover upon the whole case, it should be submitted to the jury, but, if either one of the defenses set up by a defendant is a good defense to the plaintiff's action, and is sustained by evidence, which is all one way, and with respect to which there is no conflict, it is proper for the court to declare the law to be that the plaintiff is not, under the pleadings and evidence, entitled to recover. (*National Bank v. American Exch. Bank*, 527.)

2. **TRIAL—PREPONDERANCE OF EVIDENCE.—AN INSTRUCTION** that the jury must find according to the preponderance of the evidence is erroneous, since mere preponderance may not convince the minds of the jury, and, to justify a verdict, the measure of proof must reasonably satisfy the minds of the jury that the fact exists. (*Pullman etc. Co. v. Adams*, 53.)

3. **TRIAL—VERDICT—PRACTICE.**—In actions of contract against more than one defendant, the jury may return a separate verdict as to each defendant, or as to two or more defendants jointly, and judgments shall be entered accordingly. (*Gleason v. Sanitary Milk Supply Co.*, 370.)

4. **TRIAL—NONSUIT.**—On motion for a nonsuit, everything which the evidence tends to prove must be taken as true. (*Cameron v. Kenyon-Connell Com. Co.*, 602.)

5. **CRIMINAL LAW—VERDICT—JEOPARDY.**—A verdict of guilty on counts 1 and 3 and disagreeing as to count 2 is a verdict of acquittal as to the second count if the verdict is not afterward set aside; but, if the verdict is set aside on appeal, the defendant cannot claim an acquittal under the second count. (*State v. McGee*, 741.)

6. **TRIAL—ELECTION—DISCRETION.**—It is within the discretion of a trial judge to require a party to elect upon which count he will go to trial. (*State v. Bouknight*, 751.)

7. **TRIAL—INDICTMENT—ELECTION OF COUNTS.**—Where one count of an indictment alleges that the offense was committed in the night-time, and another count alleges that the same offense was committed in the daytime, the prosecution may be compelled to elect on which count they will go to trial. (*State v. Bouknight*, 751.)

8. **NEW TRIAL—INDETERMINATE SENTENCE ACT—NO EVIDENCE AS TO AGE OF DEFENDANT.**—The age of a defendant, in a prosecution for larceny, has nothing to do with the question of his guilt or innocence. It is important only with reference to the place of his confinement, during the term of his imprison-

ment, where persons between certain ages are deemed, under the statute, proper subjects for a reformatory. Hence, a new trial will not be granted because there was no evidence as to the age of the defendant, although the jury found that he was over sixteen and under thirty years of age. (*Colip v. State*, 322.)

TRUSTEES.

See Banks and Banking, 14, 15; Trusts.

TRUSTS.

1. **TRUST—FIDUCIARY—WHEN NOT CREATED.**—Where a purchaser of land is in the possession of the money of a third person which was not loaned or delivered to him, and applies it to the payment of the purchase money of the land, a fiduciary trust is not created in favor of such third person, since no fiduciary relation exists between him and the purchaser. (*Allen v. Caylor*, 31.)

2. **TRUST—RESULTING—MONEY LOANED TO PURCHASE LAND.**—The contributing to the purchase of land of a sum of money which is not an aliquot part of the whole does not create a resulting trust in favor of the party so contributing. (*Allen v. Caylor*, 31.)

3. **TRUSTS—IMPERFECT GIFT AS—INSURANCE POLICY.**—A trust in an insurance policy cannot be deduced from an imperfect gift thereof. (*Weaver v. Weaver*, 173.)

4. **TRUSTS AND TRUSTEES—LIMITATIONS OF ACTIONS.**—The fact that money due a cestui que trust is allowed by him to remain in the hands of the trustee after the termination of an express trust does not change the nature of the debt, and, until an accounting is had or demanded, the statute of limitations does not begin to run. (*Jones v. Home Sav. Bank*, 377.)

5. **TRUSTS AND TRUSTEES—ACCOUNTING—PRESUMPTION.**—If the trustee of an infant, upon the beneficiary's arriving at majority, renders him an account, and he, without personal knowledge of the transactions, gives a receipt upon the basis of such account, and subsequently discovers, upon the examination and finding of a referee, that, at the time when the receipt was given, a large amount of money or property remained in the trustee's hands unaccounted for, the finding of the referee so far overcomes the prima facie effect of the receipt as to raise a presumption of liability on the part of the trustee or his estate. (*Jones v. Home Sav. Bank*, 377.)

6. **TRUSTS AND TRUSTEES—TRUSTEE EX MALEFICIO.**—A creditor who receives a conveyance from his debtor of land worth an amount in excess of his debt, upon an express oral promise to reconvey when his debt is discharged, and then, after satisfying his debt out of the proceeds of a sale of part of the land, refuses to reconvey the remainder, is guilty of fraud, and becomes a trustee ex maleficio to the debtor, or to a person who purchases under an execution against the debtor, and the purchaser may maintain a bill in equity to compel a reconveyance. (*Goodwin v. McMinn*, 703.)

ULTRA VIRES.

See Corporations, 11, 12.

USURY.

1. **USURY—ASSIGNEE OF MORTGAGE.**—One who buys land expressly subject to an existing mortgage, or who undertakes, as

part of the consideration for the land, to pay the debt secured by such mortgage, cannot defeat the foreclosure of the mortgage by a plea of usury. (*Hiner v. Whitlow*, 74.)

2. **USURY—CONSTRUCTION OF STATUTE.**—A person who purchases land, and, in part payment therefor, undertakes to pay the debt secured by an existing mortgage thereon, cannot defeat a foreclosure of such mortgage on a plea of usury, under a statute conferring upon a purchaser of real estate the right to set up usury in an existing mortgage thereon in so far as such mortgage is in conflict with his rights. (*Hiner v. Whitlow*, 74.)

3. **USURY—PURCHASE OF NOTE.**—If a bank discounts a note for an indorser who is neither the maker nor the payee, it may pay any agreed rate for the note, and the transaction is legal and not usurious. (*Cook v. Forker*, 699.)

VACATING STREETS.

See Municipal Corporations, 2, 3.

VENDOR AND PURCHASER.

1. **VENDOR AND PURCHASER—SALE PENDING LITIGATION.**—A purchaser from the defendant while a suit is pending acquires his interest subject to such decree as may be rendered on the hearing. (*Harding v. American Glucose Co.*, 189.)

2. **VENDOR'S LIEN—ASSIGNMENT—STATUTE OF FRAUDS.**—In equity, a vendor's lien is not considered an interest in land, and may be assigned in parol, without offending the statute of frauds. (*Allen v. Caylor*, 31.)

3. **VENDOR'S LIEN — SUBROGATION — PAROL AGREEMENT.**—One who pays off a vendor's lien on land at the request of the debtor, upon an agreement that he shall have a lien for his reimbursement, is subrogated to the rights of the vendor in respect of the lien, though the agreement under which the purchase money was paid rested in parol. (*Allen v. Caylor*, 31.)

4. **STATUTE OF FRAUDS—PAROL AGREEMENT FOR PURCHASE OF INTEREST IN LANDS.**—Where one loans money to a purchaser of lands who takes title in his own name, under an oral promise that the lender should have an interest in the land to the extent of his loan, such an agreement is only for the purchase of an interest in land, and, being in parol, is not enforceable. (*Allen v. Caylor*, 31.)

5. **STATUTE OF FRAUDS—SALE OF LAND.**—Where, upon the sale of land, a large part of the purchase money is paid, and the purchaser is put in possession, the contract may be in parol and is unaffected by the statute of frauds. (*Merrell v. Witherby*, 39.)

6. **CONDITION SUBSEQUENT—WAIVER.**—A breach of a condition subsequent does not complete a forfeiture, for a breach may be waived and is not, therefore, self-operative to divest the grantee's title; but, if the breach is not waived, it may be made the occasion of re-entry and enforcement of forfeiture. (*Preston v. Bosworth*, 313.)

VENDOR'S LIEN.

See Vendor and Purchaser, 2, 3, 5.

VERDICT.

See Appeal, 8; Larceny, 7; Trial, 3, 5.

WAREHOUSEMEN.

WAREHOUSEMAN—LIABILITY FOR NEGLIGENCE.—

Where a warehouseman receives cheese in wooden boxes in good condition, to keep in a dry room at thirty-two degrees temperature, and kept at such temperature by overhead pipes filled with brine, a receipt, stating that the property is kept at the owner's risk of any loss or damage from water, etc., does not relieve the warehouseman from liability for damage caused by the dripping of water from the overhead pipes resulting from his negligence in not giving them proper attention and care. (*Minnesota Butter etc. Co. v. St. Paul etc. Co.*, 515.)

WATERS AND WATERCOURSES.

1. WATER AND WATERCOURSES—SURFACE WATER—LIABILITY FOR OBSTRUCTING.—The right of a landowner to obstruct the natural drainage or flow of surface water is not absolute, and he is liable when he unnecessarily injures the land of upper proprietors by the erection of an embankment or levee, when by reasonable care and expense he might have avoided such injury. (*Baker v. Allen*, 93.)

2. WATER AND WATERCOURSES—OBSTRUCTION OF SURFACE WATER—LANDLORD AND TENANT.—During the time that a tenant is in exclusive possession of premises, the landlord is not liable for the act of the former in obstructing the natural flow of surface water to the injury of an upper proprietor, if such landlord neither licensed nor consented to such obstruction. (*Baker v. Allen*, 93.)

3. WATER AND WATERCOURSES—OBSTRUCTING SURFACE WATER—PROSPECTIVE DAMAGES.—A levee composed of earth, less than two feet high, and only a few inches thick, is not such an obstruction to the natural flow of surface water as will work a permanent injury to the land of an upper proprietor and justify an award of prospective damages. (*Baker v. Allen*, 93.)

4. WATERS AND WATERCOURSES—NAVIGABLE WATERS—INJUNCTION TO RESTRAIN INTERFERENCE WITH PUBLIC RIGHTS IN.—Any attempt by any person or corporation to violate public rights in the navigable waters of the state to the special injury of a particular person may be restrained by a private suit. (*Prieve v. Wisconsin etc. Co.*, 904.)

5. WATERS AND WATERCOURSES—NAVIGABLE WATERS AND LANDS THEREUNDER—TITLE TO.—The navigable waters of the state and the lands thereunder belong to the state in all situations, so far as necessary to preserve inviolate the common-law right to enjoy those incidents which were not the subject of private ownership in navigable waters at the common law, and the legislature must preserve such right for the benefit of all of the people of the state. (*Prieve v. Wisconsin etc. Co.*, 904.)

6. WATERS AND WATERCOURSES—NAVIGABLE LAKES AND LAND THEREUNDER.—Submerged land of navigable lakes cannot, by legislative enactment, in the furtherance of private interests, be made the subject of private ownership, and the state is powerless to divest itself of its title and trusteeship of such lands under the guise of promoting the public health, but in fact in the furtherance of private interests. (*Prieve v. Wisconsin etc. Co.*, 904.)

7. WATERS AND WATERCOURSES—STREET BOUNDED BY LAKE—RIPARIAN RIGHTS.—If the boundary line of a public street and a navigable lake meet, the riparian rights incident to the land composing the street belong to the public, although the quali-

ded title to the street is in private hands. (*Pewaukee v. Savoy*, 859.)

8. **WATERS AND WATERCOURSES—LAKES AND LAND THEREUNDER—TITLE TO.**—Submerged lands of navigable lakes within the boundaries of the state belong to the state in trust for public use, substantially the same as submerged land under navigable waters at common law, and the state cannot change the condition of the title to the detriment or abdication of such trust. (*Pewaukee v. Savoy*, 859.)

9. **WATERS AND WATERCOURSES—LAKES WITH ARTIFICIALLY RAISED LEVEL—TITLE IN STATE BY DEDICATION.**—If a person artificially raises the level of the waters of a navigable lake, and maintains such condition for a length of time sufficient to confer title by prescription, during which time the public use and enjoy such lake, the title to his lands thereunder vests in the state by dedication, and he is estopped to revoke such dedication. (*Pewaukee v. Savoy*, 859.)

10. **WATER AND WATERCOURSES—LAKES ARTIFICIALLY RAISED—TITLE TO LAND UNDER.**—The title of the state to lands under the water of navigable lakes extends so as to include lands covered by an artificial raising of the level of such lakes, provided such artificial level is continued for such length of time as to confer the right by prescription to maintain it permanently. (*Pewaukee v. Savoy*, 859.)

11. **WATER AND WATERCOURSES—LAKES ARTIFICIALLY RAISED—LEVEL OF RIGHTS OF PUBLIC IN.**—If a person artificially raises the level of the waters of a navigable lake, the public rights therein are correspondingly extended so long as such artificial level is maintained. (*Pewaukee v. Savoy*, 859.)

See Municipal Corporations, 4, 5.

WILLS.

1. **WILLS—CONSTRUCTION.**—In the construction of wills the law, in doubtful cases, leans in favor of an absolute, rather than a defeasible, estate, of a vested, rather than a contingent, one, of the primary, rather than the secondary, interest, of the first, rather than the second, taker, as the principal object of the testator's bounty, and of a distribution as nearly conformed to the general rules of inheritance as possible. (*Patton v. Ludington*, 910.)

2. **WILLS—CONSTRUCTION—REMAINDERS.**—The rule that if a testamentary gift is found only in a direction to divide at a future time, the gift is future and contingent, and not vested, is subordinate to the primary canon of construction that the intent to be collected from the whole will must prevail. (*Patton v. Ludington*, 910.)

3. **WILLS—CONSTRUCTION OF—DECEASED CHILD.**—If a will declares that "the issue of any deceased child" of the testator "shall take by representation the share which his, her, or their parent would have taken if living," the words "deceased child" refer only to such of the testator's children as die before he dies, and not to one who survives him and takes a vested remainder under the will, but dies before coming into possession. If such surviving child marries and dies without issue, his widow is entitled, as his devisee and legatee, to the same share in the rents, issues, and income of the estate, and in the residue thereof upon its final distribution, as her husband would be entitled to if still living. (*Patton v. Ludington*, 910.)

4. **WILLS.—IN CONSTRUING WILLS** the dominating rule is, that the intention of the testator must be ascertained from the words thereof in the light of all surrounding circumstances, and, when ascertained, given effect. (*In re Donges' Estate*, 885.)

5. **WILLS—CONSTRUCTION OF.**—A testator will be presumed to have intended the complete distribution of his estate, and a construction tending to that end is preferred to one resulting in partial intestacy. (*In re Donges' Estate*, 885.)

6. **WILLS—GIFT BY IMPLICATION.**—A devise to the testator's wife of all the real property of which he dies seised, to hold until the youngest of his children, should any be born to them, attains the age of twenty-one years, and, if there should be no children surviving at his decease, she to be the sole owner of such real estate, implies that, on the majority of his after-born children, such property shall vest in them. (*In re Donges' Estate*, 885.)

7. **WILLS—DEVISE OR BEQUEST BY IMPLICATION.**—A gift by implication is presumed whenever the conclusion is inevitable that the testator so intended. (*In re Donges' Estate*, 885.)

8. **WILLS.—A PROVISION FOR AFTER-BORN CHILDREN** depriving them of their rights as heirs of the testator and restricting them to his bounty as expressed in such will need not be a presently available provision for their support on his death, nor need it be absolute or such as the court deems adequate or satisfies its sense of justice. (*In re Donges' Estate*, 885.)

9. **WILLS—PROVISION FOR AFTER-BORN CHILDREN, WHAT IS.**—A devise of property to the testator's wife to hold until the youngest of his children reaches twenty-one years of age, should any be born to him, is, in contemplation of law, the making of a provision for his after-born children. Hence their rights must be determined by the will. (*In re Donges' Estate*, 885.)

10. **WILLS—ERRONEOUS DESCRIPTION OF LAND.**—A will purporting to dispose of the northeast quarter of a certain section which the deceased did not own, does not devise the southeast quarter of the same section which the deceased did own, since if the false description in the will is rejected as surplusage, there is no description left by which the land intended to be devised can be identified. (*McGovern v. McGovern*, 489.)

11. **WILLS—WITNESSES—REQUEST TO SIGN.**—A testator is not required to request the witnesses to subscribe to his will. Such request may be implied from his conduct, or well-understood signs, or it may be made by another, in the presence of the testator with his knowledge and acquiescence. (*Burney v. Allen*, 637.)

12. **WILLS—WITNESSES.**—The testator must actually have seen, or have been in a position to see, not only the witness but the writing paper itself, at the time the witnesses signed the instrument, in order to constitute it a valid will. (*Burney v. Allen*, 637.)

13. **WILLS—WHO MAY NOT CONTEST.—UNDER A STATUTE** providing that a will may be contested by "any person interested therein," these words refer to and include only such persons as took an interest in the estate under and by virtue of the provisions of the will. (*Lockard v. Stephenson*, 63.)

14. **WILLS—WHO MAY CONTEST.—THE CREDITOR** of an heir is not a party interested in a will within the meaning of a statute which gives the right to contest a will to "any person interested therein." (*Lockard v. Stephenson*, 63.)

15. **ESTATES OF DECEDENTS—COSTS—COUNSEL FEES, ALLOWANCE OF AS.**—An allowance may be made to an executor for

his counsel fees incurred in the performance of his official duties, but where a litigation takes place between others respecting the admission to probate or the construction of a will, no allowance can be made in favor of any of them payable out of the estate, except for taxable costs. This does not include the fees of attorneys. (*In re Donges' Estate*, 885.)

16. ESTATES OF DECEDENTS—COSTS, ALLOWANCE OF.—In cases for the probate or construction of wills the court is not, as to the allowance of taxable costs, controlled by the precise terms of the statute, but has discretion broad enough to permit it to allow or withhold such costs, or authorize their payment out of the estate. (*In re Donges' Estate*, 885.)

17. COSTS.—THE RIGHT OF LITIGANTS TO COSTS IS WHOLLY STATUTORY, and for the court to allow or apportion costs it is necessary to point to some specific provision of the statute giving the right. (*In re Donges' Estate*, 885.)

18. WILLS—CONSTRUCTION—COUNSEL FEES.—In an action to construe a will, a judgment providing for the allowance to the respective parties of counsel fees, payable out of the estate, is erroneous. (*Patton v. Ludington*, 910.)

See Devise; Legacy.

WITNESSES.

1. WITNESSES—PHYSICIANS AS EXPERTS—REFUSAL TO TESTIFY.—A physician, subpoenaed as an expert witness only, cannot refuse to testify upon the ground that no compensation greater than that allowed to ordinary witnesses has been paid or promised to him. (*North Chicago St. R. R. Co. v. Zeiger*, 157.)

2. WITNESSES—REFUSAL TO ANSWER IMMATERIAL QUESTION—EFFECT OF.—A witness may not refuse to answer merely because a question calls for immaterial testimony, where no self-incrimination or privileged communication is involved; and the fact of such refusal is to be considered against him, the same as any other refusal to produce evidence which is within the power of a witness. (*Harding v. American Glucose Co.*, 189.)

3. WITNESSES — SUSTAINING CHARACTER OF.—If the character of a witness is gone into, the only proper subject of inquiry is as to his reputation for truth and veracity. Neither his general character, nor particular phases or traits of character, can be gone into, but the inquiry must be confined to his reputation of character for truth and veracity. (*Mercer v. State*, 135.)

4. HUSBAND AND WIFE AS WITNESSES—INTEREST OF PARTY—EFFECT OF STATUTE.—If the incompetency as witnesses of husband and wife on the ground of interest has been removed by statute, either of them may testify, for or against the other, to any fact the knowledge of which was acquired by him or her independently of the marriage relation in any manner not involving the confidence growing out of such relation. (*Mercer v. State*, 135.)

5. HUSBAND AND WIFE AS WITNESSES—INTERESTED PARTY—PRIVILEGED COMMUNICATIONS.—A statute removing the incompetency of husband and wife as witnesses for or against each other on the ground of interest does not remove the inhibition of the law against the exposure in evidence of confidential communications between them. (*Mercer v. State*, 135.)

6. HUSBAND AND WIFE — PRIVILEGED COMMUNICATIONS.—The matter that the law prohibits either the husband or the

wife from testifying to as witnesses includes any information obtained by either during the marriage or by reason of its existence. It should not be confined to mere statements by one to the other, but embraces all knowledge upon the part of either obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known. (*Mercer v. State*, 135.)

7. HUSBAND AND WIFE AS WITNESSES—INTERESTED PARTY—PRIVILEGED COMMUNICATIONS.—A statute removing the incompetency as witnesses of husband and wife because of the interest of either, in both civil and criminal cases, does not empower either of them, when they become witnesses, to give illegal or incompetent testimony, by detailing or exposing those transactions or communications that have passed between them in the confidence and trust that should exist between husband and wife. (*Mercer v. State*, 135.)

8. WITNESSES—EVIDENCE TO SUPPORT GOOD CHARACTER.—If the character of a witness for truth is attacked in any way, either by showing contradictory statements of the matter of his evidence out of court different from that sworn to, or by cross-examination, or by general evidence of want of character for truth, or that he has been convicted of crime, or engaged in some act affecting his credibility, like suborning or attempting to suborn a witness or suppress testimony, it is competent for the party calling him to give general evidence in support of his good character. In determining the propriety of the admission of evidence to sustain the character of the witness, the distinction should be observed between an attack upon the character of the witness as such, for credibility, and an attack upon the character of the testimony given, for belief. (*Mercer v. State*, 135.)

9. WITNESSES—TESTIFYING AFTER BEING SWORN.—If the testimony of a witness is incompetent from any legal cause, he may be prevented from testifying, even after he has been called and sworn. (*State v. Sumner*, 707.)

10. WITNESSES—SURREBUTTAL—CHARACTER.—Where a witness testifies for the first time in rebuttal, the admission of testimony in surrebuttal attacking the character of such witness is within the discretion of the trial judge. (*State v. Sumner*, 707.)

11. WITNESSES—CROSS-EXAMINATION.—A witness cannot be contradicted on a collateral issue brought out on cross-examination, even for the purpose of impeaching the witness. (*State v. Sumner*, 707.)

12. WITNESSES—THE CROSS-EXAMINATION OF A DEFENDANT IN A CRIMINAL CASE is not confined to matters brought out on direct examination, but may relate to any matter tending to develop the state's case. (*State v. McGee*, 741.)

13. WITNESSES—OBJECTIONS TO QUESTIONS—WAIVER.—A party does not waive his right to object to a question by failing to object to a similar question asked of another witness. (*State v. McGee*, 741.)

14. WITNESSES—COMPETENCY—ACTION AGAINST ADMINISTRATOR.—The word "party," in a statute which prohibits either "party" to an action against an administrator from testifying against the other as to any transaction with, or statement by, an intestate, unless called to testify thereto by the opposite party, is used technically. It excludes those only who are parties to the issue to be tried, and does not include those who are not parties, though they have an interest in the result of the issue. Hence, though one having a claim against an administrator would be incom-

petent to testify in an action against the administrator, if he had brought the action himself, yet he is competent, after an assignment of his claim, to testify in such action as to transactions between himself and the deceased. (Witte v. Koeppen, 826.)

See Wills, 11, 12.

WRIT OF ERROR.

See Appeal, 12-14.

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